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TRANSCRIPT OF RECORD.

JPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 93.

DAVID SHAPIRO, PLAINTIFF IN ERROR,

vs.

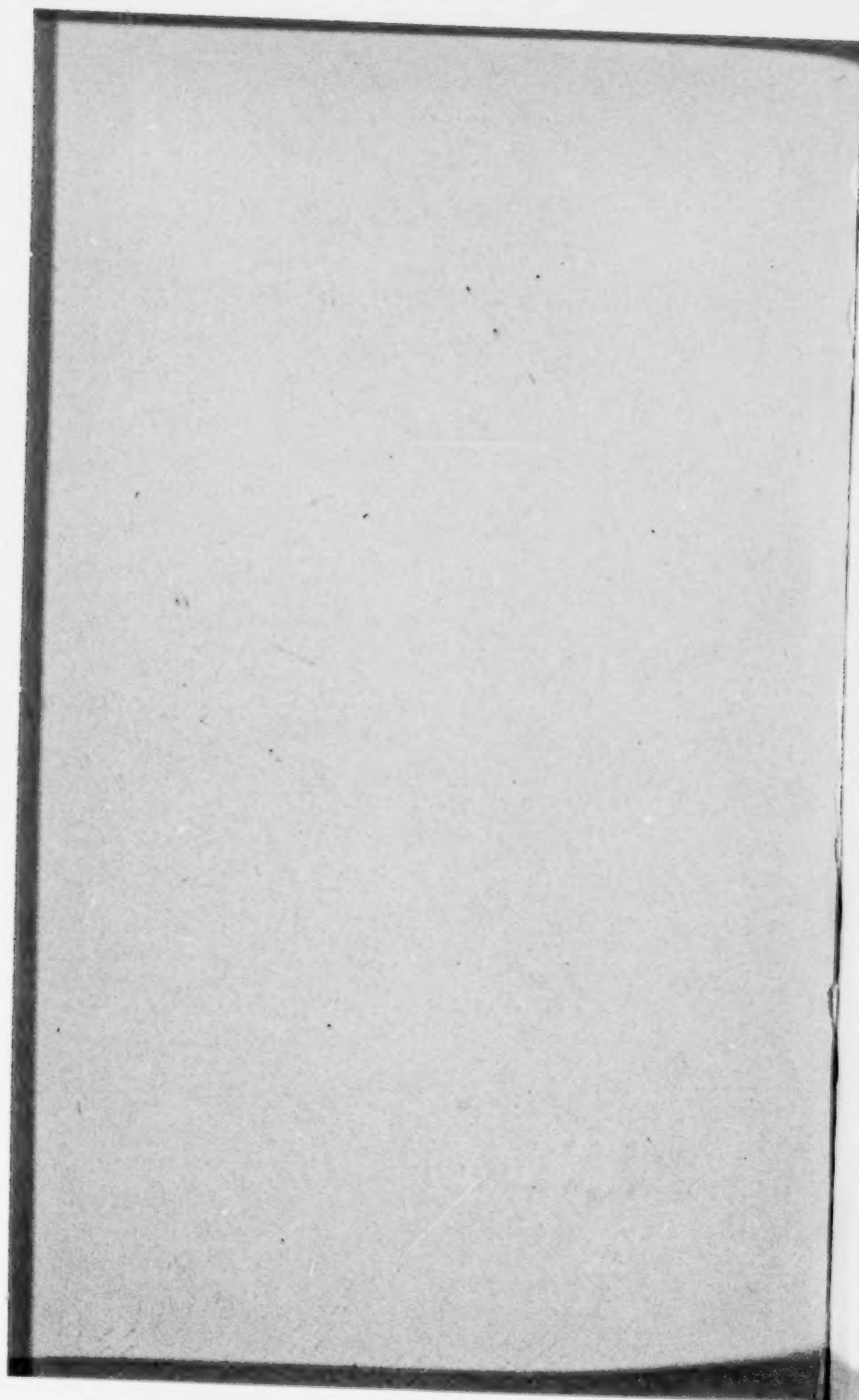
THE UNITED STATES OF

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT**



FILED JANUARY 9, 1913.

(23,495)



(23,495)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

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DAVID SHAPIRO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the division and district aforesaid on the first Monday of November (it being the fourth day thereof) in the year of our Lord One thousand nine hundred and twelve and of the Independence of the United States of America the 137th year. Present the Honorable Kenesaw M. Landis, and the Honorable George A. Carpenter, Judges of said Court presiding, Luman T. Hoy, United States Marshal for said District, and T. C. MacMillan, Clerk of said Court.

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4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Be it remembered that heretofore, to wit, on the 21st day of June, A. D. 1910, the following order was had and entered of record in the above entitled cause, in the District Court of the United States for the Northern District of Illinois:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come the grand jury this day and return in open court an indictment against David Shapiro, the defendant herein, whereupon on motion of the United States attorney, it is Ordered by the Court that said indictment be filed and the cause placed upon the dockets at this Court.

And afterwards, to wit, on the 21st day of June, A. D. 1910, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Indictment; same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

In the District Court thereof, December Term, A. D. 1909, ss.:

The grand jurors for the United States of America, inquiring for the Eastern Division of the Northern District of Illinois, upon their oaths present, that one David Shapiro, late of the city of Chicago,

in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, unlawfully, knowingly and wilfully did remove and aid and abet in the removal of certain distilled spirits, to wit, twenty thousand proof gallons of distilled spirits, on which the internal revenue tax then imposed by law on such spirits had not been paid, from a certain distillery there situate to a place other than the distillery-warehouse provided by law; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said David Shapiro, late of the city of Chicago, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, unlawfully, knowingly and wilfully, and with intent to defraud the United States, did aid and abet in the removal of certain large quantities, to wit, twenty thousand proof-gallons, of distilled spirits, on which the internal revenue tax then imposed by law upon such spirits had not been paid, from a certain distillery there situate, to wit, from the distillery premises of the Illinois Fruit Distilling Company, at said city of Chicago, to a place other than the distillery-warehouse provided by law, to wit, to the place of business of him, the said David Shapiro, in the said City of Chicago, Illinois; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said David Shapiro, late of the city of Chicago, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, unlawfully, knowingly and wilfully did conceal, and aid in the concealment of, certain distilled spirits, to wit, twenty thousand proof-gallons of distilled spirits, on which the internal revenue tax then imposed by law on such spirits had not been paid, and which said spirits had theretofore unlawfully been removed from a certain distillery there situate to a place other than the distillery-warehouse provided by law; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said David Shapiro, late of the city of Chicago, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, unlawfully, knowingly and wilfully, and with intent to defraud the United States, did conceal and aid in the concealment of certain large quantities, to wit, twenty thousand proof-gallons, of distilled spirits on which the internal revenue tax then imposed by law upon such spirits had not been paid, and which said spirits had

theretofore unlawfully been removed from a certain distillery there situate, to wit, from the distillery of the Illinois Fruit Distilling Company in the said city of Chicago, Illinois, to a place other than the distillery-warehouse provided by law, to wit, to the place of business of him, the said David Shapiro in the said city of Chicago, Illinois; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

5. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said David Shapiro, late of the city of Chicago, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, was engaged in and did carry on the business of a rectifier, within the intent and meaning of the internal revenue laws of the United States; and that the said David Shapiro, at Chicago aforesaid, in the division and district aforesaid, on, to wit, the day and year last aforesaid, then and there being a rectifier as aforesaid, unlawfully, knowingly and wilfully did carry on the said business of a rectifier, with intent to aid, abet and assist certain persons to the said grand jurors unknown, in defrauding the United States of the tax on large quantities, to wit, twenty thousand proof-gallons, of distilled spirits; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

6. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David Shapiro, late of the city of Chicago, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, did carry on the business of a rectifier, within the intent and meaning of the internal revenue laws of the United States, and being then and there a rectifier as aforesaid, then and there unlawfully, knowingly and wilfully did carry on said business of rectifier, with intent to aid, abet and assist certain persons, to wit, Simon Frindel, Max S. Bronstein, Frank Weiss, Abram Weiss, and Jacob Seltzer, and certain other persons to the said grand jurors unknown, in defrauding the United States of the tax on large quantities, to wit, twenty thousand proof-gallons, of distilled spirits produced by them, the said Simon Frindel, Max S. Bronstein, Frank Weiss, Abram Weiss and Jacob Seltzer, and said other persons to the grand jurors unknown; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

7. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David Shapiro, at Chicago aforesaid, in the said division and district, and within the jurisdiction of this court, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, was engaged in and did carry on the business of a rectifier, within the intent and meaning of the internal revenue laws of the United States, and that the said David Shapiro, being then and there a rectifier as aforesaid, unlawfully and know-

ingly did then and there purchase and receive certain large quantities, to wit, twenty thousand gallons, of distilled spirits which had theretofore been removed from a distillery to a place other than the distillery-warehouse provided by law, and on which said distilled spirits, as the said David Shapiro then and there well knew, and had reasonable grounds to believe, the tax then required by law, to wit, the internal revenue tax on distilled spirits, had not been paid; against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

8. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said David Shapiro, at Chicago aforesaid, in the said division and district, and within the jurisdiction of this court, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, was engaged in and did carry on the business of a rectifier, within the intent and meaning of the internal revenue laws of the United States, and being then and there a rectifier as aforesaid, unlawfully and knowingly did then and there purchase and receive certain large quantities, to wit, twenty thousand gallons, of distilled spirits which had theretofore been removed from a distillery, to wit, from the distillery of the Illinois Fruit Distilling Company, in the said city of Chicago, Illinois, to a place other than the distillery-warehouse provided by law, to wit, to the place of business of him, the said David Shapiro in said city of Chicago, Illinois, and on which said distilled spirits the said David Shapiro then and there well knew, and had reasonable grounds to believe, the
6 internal revenue tax then imposed by law had not been paid; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

9. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said David Shapiro, at Chicago aforesaid, in the said division and district, and within the jurisdiction of this court, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, was a wholesale liquor dealer within the intent and meaning of the revenue laws of the United States, and as such wholesale liquor dealer was required by law to provide a book to be prepared and kept in such form as the Commissioner of Internal Revenue might prescribe, and to enter in said book, on the day of the receipt thereof, and before any part thereof shall be drawn off, added to or in any way altered, the number of wine-gallons and proof-gallons and kind of distilled spirits received by him, the said David Shapiro, together with the date when, and the name of the person or firm from whom, and the place whence the said spirits were received and by whom distilled, and the number and kind of adhesive stamps on the packages containing the said distilled spirits, if received in the original packages, and that the said David Shapiro, being then and there a wholesale liquor dealer as aforesaid, on the day and year aforesaid, in the said division and district, and within the jurisdiction of said court, did receive large quantities, to wit, twenty thousand gallons of distilled spirits, and

unlawfully, knowingly and wilfully did refuse and neglect to make any entry whatsoever in said book, the form of which had theretofore been prescribed by the Commissioner of Internal Revenue, and a copy of which was in the possession of and kept by the said David Shapiro, in relation to the said twenty thousand gallons of distilled spirits so received by him, the said David Shapiro, as aforesaid, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

10. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David Shapiro, on, to wit, the first day of April, 1910, at Chicago aforesaid, in the division and district aforesaid, was a rectifier within the intent and meaning of the internal revenue laws of the United States, and, as such rectifier, the said David Shapiro was required by law, before emptying any package of distilled spirits for the purpose of rectifying or com-

7 pounding such distilled spirits, to give notice in duplicate of his intention so to do to the collector of internal revenue for the district in which he was engaged in the business of a rectifier, as aforesaid, and to submit such package of distilled spirits so intended to be emptied, compounded or rectified, for the inspection of a United States gauger, before emptying said package of distilled spirits for rectification, and before rectifying or compounding said distilled spirits in the package; and so the said grand jurors upon their oaths present that the said David Shapiro, at the said city of Chicago, in the division and district aforesaid, on the day and year aforesaid, being then and there a rectifier as aforesaid, unlawfully, knowingly and wilfully did empty from the containing package for the purpose of rectifying and compounding the same, and did rectify and compound in the package large quantities, to wit, twenty thousand gallons of distilled spirits, without giving any notice to the said collector of internal revenue of his intention so to do, and without submitting the packages containing said distilled spirits for the inspection of a United States gauger, a further description of which said packages is to the said grand jurors unknown; against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

11. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David Shapiro, on the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, did have in his possession certain, to wit, ten, packages, which theretofore had contained distilled spirits, and which said packages so containing distilled spirits as aforesaid theretofore had been duly inspected, marked and stamped, as required by law; and which said packages, and each of them, then and there bore the stamps and inspection marks aforesaid; and that the said David Shapiro, on the day and year aforesaid, at the said City of Chicago, in the said division and district, so having in his possession the said packages, which then and there had thereon the stamps and inspection marks aforesaid, unlawfully, knowingly and wilfully did fraud-lently use the said

packages, and each of them, then and there having the inspection marks and stamps thereon, as aforesaid, for the purpose of selling therefrom other spirits, and spirits of quantity and quality different from the spirits previously inspected in said packages, and each of them, as aforesaid, a further description of which said packages and of the marks and stamps thereon being to the said grand jurors unknown; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

12. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David Shapiro, on the said first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the said division and district, did empty and draw off and cause to be emptied and drawn off certain distilled spirits, from divers, to wit, ten packages, each of which said packages then and there bore a certain stamp required by law, that is to say, a certain internal revenue stamp called a tax paid stamp, and certain marks and brands required by law, a further description of which said stamps and of the said marks and brands being to the said grand jurors unknown; and that the said David Shapiro then and there knowingly, unlawfully and wilfully, did fail to efface and obliterate the said stamps and said marks and brands, respectively on the said packages, and each of them, at the time of emptying the said packages as aforesaid; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

13. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said David Shapiro, on the said first day of April, nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, unlawfully and knowingly and with intent to defraud the revenue did purchase and receive divers, to wit, ten packages, containing distilled spirits, each of greater capacity than twenty wine-gallons, which said packages and each of them were then and there stamped, branded and marked in such way as to show and indicate that the said contents thereof had been duly inspected and that the tax thereon had been paid, and that the provisions of the revenue laws of the United States with respect thereto had been complied with, a further description of said packages and of said stamps, brands and marks being to the said grand jurors unknown, and which said packages, and each of them, then and there contained distilled spirits other than were contained therein when said packages and been lawfully marked and branded by an officer of the revenue, and stamps lawfully affixed thereon; against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

EDWIN W. SIMS,

United States Attorney.

Endorsed: No. 4451. United States District Court, Northern District of Illinois, Eastern Division. The United States of America vs.

David Shapiro. Indictment Violation Secs. 3296, 3317, 3318, 3324, 3326, 3455, R. S. and Act July 16, 1892. A true bill, Geo. W. Wakefoeld, Foreman. Filed in open court this 21st day of June, A. D. 1910. T. C. MacMillan, Clerk. Bail \$5,000.00. No Warrant.

And afterwards, to wit, on the 24th day of June, A. D. 1910, the following order was had and entered of record in said cause, to wit,

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States attorney, comes also the defendant David Shapiro in his own proper person and said defendant being arraigned upon the indictment filed herein against him, pleads not guilty thereto, whereupon it is Ordered by the Court that this cause be and the same hereby is continued until June 27, 1910 with leave to the defendant to demur by that date.

And afterwards, to wit, on the 29th day of June, A. D. 1910, the following order was had and entered of record in said cause, to wit,

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4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes David Shapiro the defendant herein in his own proper person with the sureties on his appearance bond and presents said bond to the court for approval, and it appearing that the same is regular in form, properly conditioned for the penal sum fixed by the court and that the sureties are sufficient and ample security therefor, it is Ordered by the court that the said bond be and the same hereby is approved.

And afterwards, to wit, on the 22nd day of September, A. D. 1910, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States Attorney, comes also the defendant by his attorney and on motion

and for good cause shown it is Ordered by the Court that this cause be and it hereby is set for trial on ten days' notice.

And afterwards, to wit, on the 5th day of December, A. D. 1910, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States attorney, comes also the defendant by his attorney and on motion and for good cause shown it is Ordered by the court that this cause be and it hereby is continued until December 12, 1910.

11 And afterwards, to wit, on the 17th day of December, A. D. 1910, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States attorney, comes also the defendant by his attorney and on motion and for good cause shown it is Ordered by the court that this cause be and it hereby is continued until December 19, 1910 for hearing on motion of plaintiff to increase bond.

And afterwards, to wit, on the 19th day of December, A. D. 1910, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States attorney, and on his motion it is Ordered by the court that a bench warrant be awarded for David Shapiro the defendant herein.

And afterwards, to wit, on the 22nd day of December, A. D. 1910, the following order was had and entered of record, in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes David Shapiro the defendant herein in his own proper person with the sureties on his appearance bond and present- said bond to the court for approval and it appearing that the same is regular in form, properly conditioned for the penal sum fixed by the court and that the sureties are sufficient and ample security therefor, it is Ordered by the court that said bond be and the same hereby is approved.

12 And afterwards, to wit, on the 23rd day of December, A. D. 1910, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States attorney, comes also the defendant by his attorney and on motion and for good cause shown it is Ordered by the court that this cause be and it hereby is continued until January 3 1911 for trial.

And afterwards, to wit, on the 3rd day of January, A. D. 1911, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States Attorney, comes also the defendant herein by his attorney and in his own proper person and by leave of court first had and obtained said defendant withdraws his plea of not guilty heretofore entered herein and being now arraigned upon the indictment filed herein against him pleads nolo contendere thereto, whereupon it is Ordered by the court that this cause be continued until January 17, 1911.

And afterwards, to wit, on the 17th day of January, A. D. 1911, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States attorney, comes also the defendant by his attorney and on motion and for good cause shown it is Ordered by the Court that this cause be and it hereby is continued.

13 And afterwards, to wit, on the 20th day of January, A. D. 1911, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Comes the United States by Edwin W. Sims, Esq., United States Attorney and *and* declines to further prosecute this suit against the said defendant on counts numbered 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13 of the indictment and by leave of court enters a nolle prosequi herein, as to said counts, whereupon it is Ordered by the Court that the defendant go hence without day discharged from further prosecution under counts numbered 1, 2, 3, 5, 6, 7, 8, 10, 11, and 13 of the indictment herein.

And afterwards, to wit, on the 20th day of January, A. D. 1911, the following order was had and entered of record, in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

This cause coming on to be heard on defendant's plea of nolo contendere heretofore entered herein, come the parties by their attorneys and the defendant in his own proper person and the hearing proceeds, and the court having heard the evidence by the parties adduced and statements of counsel and not being sufficiently advised in the premises, takes the cause under advisement.

And afterwards, to wit, on the 23rd day of January, A. D. 1911, the following order was had and entered of record in said cause, to wit:

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4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come again the parties by their attorneys and the defendant in his own proper person and the court having considered and being now fully advised in the premises finds the defendant David Shapiro guilty as charged in the indictment and said defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and Ordered by the court and is the sentence and judgment of the court upon the finding of guilty as aforesaid, that said defendant David Shapiro be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for and during a period of two years and that he forfeit and pay to the United States a fine in the sum of ten thousand dollars besides the costs in this behalf expended, for which let execution issue. Whereupon the said defendant by his attorneys enters his motion to vacate the sentence herein, and the hearing of said motion is continued two weeks.

15 And afterwards, to wit, on the 15th day of February, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come the parties by their attorneys and said defendant by his attorney enters his motion for a change of venue and the Court having heard the arguments of counsel on said motion and being fully advised in the premises overrules and denies the same to which order of the Court said defendant by his attorney duly excepts and leave is given said defendant to file his bill of exceptions herein in ten days and thereupon on motion of the plaintiff leave is given to file the mandate of the United States Circuit Court of Appeals, and thereupon the Court being fully advised in the premises refuses to accept the plea of nolo contendere tendered by said defendant to which order and ruling of the Court said defendant by his attorney duly excepts and is given ten days within which to file his bill of exceptions and thereupon said defendant is ruled to plead to the indictment filed herein against him but stands mute whereupon by direction of the Court, the Clerk of this Court enters a plea of not guilty to said indictment for said defendant, to which direction and to the entry of which plea said defendant is given ten days within which

to file his bill of exceptions and this cause is continued until February 22, 1912 for trial.

16 And afterwards, to wit, on the 15th day of February, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Motion for Change of Venue; same being in the words and figures following, to wit:

17 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 4462.

UNITED STATES OF AMERICA

vs.

DAVID SHAPIRO.

Motion for Change of Venue.

And now comes the defendant, David Shapiro, in his own proper person, and moves the Court to grant a change of venue from the Honorable Kenesaw M. Landis, Judge of this Court, on the ground of personal bias and prejudice on the part of said Judge against this defendant, in an affidavit which is filed with this motion.

DAVID SHAPIRO, *Defendant.*

ELIJAH N. ZOLINE AND

W. M. McEWAN,

Attorneys for Defendant.

18 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 4462.

UNITED STATES OF AMERICA

vs.

DAVID SHAPIRO.

David Shapiro being first duly sworn deposes and says that he is the defendant in the above entitled cause against whom an indictment was filed in the clerk's office of this Court on the 21st day of January, 1910, charging him with certain violations of the Revenue Laws of the United States; that the Honorable Kenesaw M. Landis, Judge of the District Court for the Northern District of Illinois, before whom the above entitled cause is to be tried, has a personal bias and prejudice against him, the defendant.

Affiant further states that he bases his belief that the said Judge has a personal bias and prejudice against the said defendant upon the following facts, to-wit:

That on the 3rd day of January, 1911, said cause came on for hearing before the said Honorable Kenesaw M. Landis, Judge of said

District Court, and by leave of Court first had and obtained, this affiant withdrew his plea of not guilty, and entered a plea of nolo contendere; that on the 20th day of January, 1911, the said Judge proceeded to hear evidence in said cause; that on the 23rd day of January, 1911, the said Judge entered an order finding this affiant guilty as charged in the indictment, and sentenced him to be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for a period of two (2) years, and that he, affiant pay to the United States a fine in the sum of Ten

19 Thousand (\$10,000.00) Dollars, besides the costs of the suit. That the said judgment, upon a writ of error sued out by this affiant, was duly reversed by the United States Circuit Court of Appeals, for the Seventh Circuit, which Court held that the said Judge sitting as the District Court of the United States for the Northern District of Illinois, exceeded the limit of the punishment upon the plea of nolo contendere as tendered by this affiant, and that upon the condition of the record, with the plea of nolo contendere, it was improper for said Judge to hear the evidence and find this affiant guilty, as from the opinion of the said Court of Appeals will more fully appear.

Affiant, therefore, believes that in as much as the said Judge Landis already heard the evidence against this affiant, found this affiant guilty, and imposed a severe sentence upon him, that he, the said Judge, has a fixed and prejudiced opinion of this case against this affiant, and that said Judge has a personal bias and prejudice against this affiant, and cannot give him, this affiant a fair and impartial trial.

And further affiant sayeth not.

DAVID SHAPIRO.

Subscribed and sworn to before me this 15th day of February, 1912.

[SEAL.]

MORRIS K. LEVINSON,
Notary Public.

20 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 4462.

UNITED STATES OF AMERICA

vs.

DAVID SHAPIRO.

Certificate of Counsel.

I hereby certify that the affidavit and application for a change of venue made by the defendant, David Shapiro, are made in good faith.

ELIJAH N. ZOLINE,
Attorney for Defendant.

UNITED STATES OF AMERICA
vs.
DAVID SHAPIRO.

I hereby certify, That, in my opinion, the foregoing application of David Shapiro for a change of venue is made by him in an honest conscientious belief and judgment and in good faith, and I join with Elijah N. Zoline, one of the Attorneys for David Shapiro, at the request of the latter.

W. M. McEWEN,
Of Counsel for David Shapiro.

22 Endorsed: Gen'l No. 4451. In the U. S. District Court. Northern District of Illinois. United States of America vs. David Shapiro. Motion for Change of Venue, Affidavit and Certificate of Counsel. Filed Feb'y 15, 1912, at 10 o'clock A. M. T. C. MacMillan, Clerk. W. M. McEwen. Elijah N. Zoline.

23 And afterwards, to wit, on the 15th day of February, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Mandate, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Illinois, before you, or some of you, in a cause between David Shapiro and United States of America, the Sentence and Judgment entered on the twenty-third day of January, 1911, is in the words and figures following, to wit:

Come again the parties by their attorneys and the defendant in his own proper person and the court having considered and being now fully advised in the premises finds the defendant David Shapiro guilty as charged in the indictment and said defendant being asked by the Court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and Ordered by the court and is the sentence and judgment of the court upon the finding of guilty as aforesaid, that said defendant David Shapiro be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for and during a period of two years and that he forfeit and pay to the United States a fine in the sum of ten thousand dollars besides the costs in this behalf expended, for which let execution issue. Whereupon the said defendant by his attorneys enters his motion to vacate the sentence herein, and the hearing of said motion is continued two weeks.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Seventh Circuit by virtue of a Writ of Error agreeably to the act of Congress, in such case made and provided, fully and at large appears

24 And Whereas, in the term of October, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by *by* counsel:

On Consideration Whereof, it is hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said District Court with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceeded further in conformity with law.

Tuesday, July 2, 1912.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Writ of Error notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of February in the year of our Lord one thousand nine hundred and twelve.

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Endorsed: 4451. United States Circuit Court of Appeals Seventh Circuit. No. 1777 October Term, 191-. Mandate Filed by leave of Court Feb. 15, 1912. T. C. MacMillan, Clerk.

25 And afterwards, to wit, on the 23rd day of February, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bill of Exceptions; same being in the words and figures following, to wit:

26 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

No. 4451.

UNITED STATES

v.

DAVID SHAPIRO.

Bill of Exceptions.

Be it remembered that on the 15th day of February, 1912, at 10 A. M., and immediately upon the calling of the above entitled cause, the defendant herein moved the Court for a change of venue from

the Honorable Kenesaw M. Landis, Judge of the District Court of the United States for reasons set forth in an affidavit duly filed by the said defendant on said February 15, 1912, and prior to the making of said application, together with a certificate of counsel as from said affidavit on file will more fully appear, but the said Judge denied said application, to which ruling of the Court the defendant by his counsel then and there duly excepted.

Thereupon the District Attorney moved the Court to reject the plea of *nolo contendere* heretofore entered in said cause, which motion was resisted by counsel for the defendant. Counsel for the defendant also then and there objected to the Honorable Kenesaw M. Landis making any order in said cause.

27 The Honorable Kenesaw M. Landis, Judge of said District Court then and there stated that he would not try said cause, and that another Judge would be assigned to try said cause against said defendant, but being conversant with the facts in the case, he would enter the order rejecting the plea of *nolo contendere*, and require the defendant to plead.

Thereupon the Court directed that an order be entered rejecting said plea of *nolo contendere* and ruling said defendant to plead *instanter*, to which ruling of Court the defendant by his counsel then and there duly excepted. Upon advice of counsel, the defendant refused to plead. Thereupon the Court directed the Clerk to enter a plea of not guilty for the defendant, to which ruling of the Court, the defendant then and there duly excepted.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed, signed and certified by the Judge, as provided by law.

Dated at Chicago this 20th day of February, 1912.

ELIJAH N. ZOLINE,

Attorney for Defendant.

The foregoing bill of exceptions is correct in all respects, and is hereby approved, allowed and settled, and is made a part of the record herein.

Done in open Court and dated this 23 day of February, 1912.

KENESAW M. LANDIS, *Judge.*

O. K.

H. W. FREEMAN.

28 Endorsed: No. 4451. In the District Court of the United States, for the Northern District of Illinois. United States vs. David Shapiro. Bill of exceptions. Filed Feb'y 23rd, A. D. 1912, at 10 o'clock A. M. T. C. MacMillan, Clerk.

29 And afterwards, to wit, on the 14th day of March, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come the parties by their attorneys and the defendant by his attorneys enters his motion for leave to file his plea of former jeopardy, and the Court having heard the arguments of counsel on said motion, in part, It is Ordered that the further hearing herein be continued until March 15, 1912.

30 And afterwards, to wit, on the 15th day of March, A. D. 1912, the following order was had and entered of record in said cause, to wit:—

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

This cause coming on again to be heard on the motion of the defendant for leave to file his plea of former jeopardy, come the parties by their attorneys and the Court having heard the arguments of counsel, and being fully advised in the premises, grants leave to said defendant to file said plea.

31 And afterwards, to wit, on the 15th day of March, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Plea of Former Jeopardy; same being in the words and figures following, to wit:

32 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

No. 4451.

UNITED STATES
vs.
DAVID SHAPIRO.

Plea of Former Jeopardy.

And the said David Shapiro in his own proper person cometh into court here, and having heard the said indictment read, saith, that the United States of America ought not further to prosecute the said indictment against him, the said David Shapiro, in respect to the offenses in the said indictment mentioned, because he says that on to-wit, the 24th day of January, A. D. 1910, the said David Shapiro, being the defendant in said cause, and being duly arraigned upon

the said identical indictment filed herein against him, pleaded not guilty thereto; that afterwards on the 3rd day of January, 1911, he, the said defendant with the consent of the United States District Attorney, for the Northern District of Illinois, and by leave of the District Court of the United States for the Northern District of Illinois, Eastern Division, first had and obtained, withdrew his plea of not guilty heretofore entered, and being again arraigned upon the indictment aforesaid filed against him by leave of said Court and with the consent of the said United States District Attorney, pleaded nolo contendere thereto; that the said plea of nolo contendere was then and there duly accepted by the said District Court; whereupon it was

ordered by the court that the cause be continued until January 17, 1911; that afterwards on the 17th day of January, 1911, the cause was, by order of court, continued; that afterwards on the 20th day of January, 1911, the matter came on for hearing before the said District Court, and on motion of the said United States Attorney, a nolle prosequi was duly entered by said court as to the counts numbered 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13 of the aforesaid indictment; that on the said 20th day of January, 1911, said cause coming on to be heard in the said District Court on the plea of nolo contendere heretofore entered by this defendant in said cause, the court heard the evidence adduced by the respective parties and the statements of counsel, but not being sufficiently advised in the premises, took the cause under advisement.

And afterwards, to-wit, on the 23rd day of January, 1911, the said cause came on again to be heard in said District Court for sentence upon said plea of nolo contendere and thereupon the said District Court sentenced this defendant to be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for and during a period of two years and that he forfeit and pay to the United States a fine in the sum of ten thousand dollars besides the costs in this behalf expended, for which an execution was ordered to be issued.

That afterwards on, to-wit, the 3rd day of February, 1911, the said David Shapiro, the defendant in the above entitled cause did duly sue out a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit, to review said judgment and sentence; that on to-wit, January 2, 1912, the said United States Circuit Court of Appeals for the Seventh Circuit, duly reversed said judgment of the said District Court on the ground that the said District

Court erred in sentencing this defendant, David Shapiro to imprisonment in the penitentiary in the manner and form as above recited and holding that under a plea of nolo contendere there can be no imprisonment imposed. The said Court of Appeals further held that it did not appear from the record before said Court of Appeals, that the nolo contendere in behalf of this defendant was accepted by the said District Court and for this reason the said Court of Appeals reversed the judgment of the said District Court and remanded the cause to that Court with direction to accept or refuse acceptance of such pleas as tendered and proceed thereupon in conformity with law. And this defendant further avers that while

it is true that some ambiguity exists in the record of said District Court as written up by the Clerk of said Court, whether the said plea of *nolo contendere* pleaded by this defendant was accepted by the said Court nevertheless, in truth and in fact, the said District Court did accept his said plea of *nolo contendere*, and, acting under and upon said plea of *nolo contendere*, heard evidence solely for the purpose of fixing the punishment to be imposed upon him, this deviously stated is merely a misprison of the Clerk of the Court for which this defendant cannot in anyway be held responsible.

And this defendant further avers that afterwards, on, to-wit, the 15th day of February, 1912, the United States District Attorney for the Northern District of Illinois filed the mandate of the said Court of Appeals in the above entitled cause, reversing said judgment of said District Court as aforesaid, and thereupon the cause was duly re-docketed in this Court.

Thereupon, to-wit, on said 15th day of February, 1912, the said United States District Attorney then and there moved the said District Court to reject and set aside the said plea of *nolo contendere* heretofore pleaded by this defendant in this Court with the consent of said District Attorney and accepted by the Court in the above entitled cause, which motion was then and there resisted and objected to by this defendant and his counsel, but the said District Court then and there against the objection of this defendant, without his consent, and without legal necessity therefor, unlawfully and without right, then and there entered an order rejecting the said plea of *nolo contendere* heretofore entered by this defendant as aforesaid, and then and there directed this defendant to plead anew to the said indictment; that this defendant then and there refused to plead again to said indictment; thereupon the Court, on its own motion, entered a plea of not guilty for this defendant, and ordered him to appear for trial upon a day to be fixed later by the court; that afterwards, to-wit, on the 27th day of February, 1912, the said District Court set the aforesaid indictment for trial against this defendant for March 12, 1912.

Wherefore, he, the said defendant says that he has once before been in legal jeopardy of his life for the same offenses as charged in the indictment upon which he is now ordered to stand trial, and that he ought not further be prosecuted on account of the premises in said indictment contained and charged. This defendant specifically pleads the Fifth Amendment to the Constitution of the United States providing, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", in bar to the further prosecution of the defendant herein; that this defendant was once placed in *in* legal jeopardy within the meaning of the said constitutional provision, and cannot be again tried therefor without violating said constitutional amendment, and avers that such trial would be without due process of law and the law of the land, and in violation of the said Fifth Amendment to the Constitution of the United States, and he hereby invokes the protection of the aforesaid constitutional amendments.

And this defendant further says that the said David Shapiro so indicted as aforesaid and who pleaded nolo contendere as above mentioned, is the same David Shapiro who is now before the Bar of this Court; that the plea of nolo contendere heretofore pleaded by this defendant was interposed to the same indictment upon which he is now ordered to stand trial; that the offenses are the same and the indictment identical.

This defendant further says that the said District Court of the United States as a Federal Court had full authority and jurisdiction of the subject matter and the person of this defendant, as set forth in said indictment, and had jurisdiction to accept said plea of nolo contendere.

Wherefore he prays judgment if the United States ought further to prosecute the said indictment against him in respect to the offenses in said indictment mentioned and that he, the said David Shapiro, may be dismissed and discharged from said indictment, and allowed to go without day, and of this he puts himself upon the country.

DAVID SHAPIRO.

STEPHEN A. DAY,

E. N. ZOLINE,

Counsel for Defendant.

37 STATE OF ILLINOIS,
 County of Cook, ss:

David Shapiro being duly sworn deposes and says that he is the defendant in the above entitled cause, that the foregoing pleas by him subscribed was duly read by him and that the same is true in substance and in fact.

DAVID SHAPIRO.

Subscribed and sworn to before me this 15th day of March, 1912.

[NOTARIAL SEAL.]

MAY E. EVENSEN,

Notary Public.

38 Endorsed: In the U. S. District Court, Northern District of Illinois. United States vs. David Shapiro. Plea of Former Jeopardy. Filed Mar. 15, 1912, at 2 o'clock P. M. T. C. MacMillan, Clerk.

39 And afterwards, to wit, on the 15th day of March, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Plea of Former Jeopardy; same being in the words and figures following, to wit:

40 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

No. 4451.

UNITED STATES
vs.
DAVID SHAPIRO.

Plea of Former Jeopardy.

And the said David Shapiro in his own proper person cometh into court here, and having heard the said indictment read, saith, that the United States of America ought not further to prosecute the said indictment against him, the said David Shapiro, in respect to the offenses in the said indictment mentioned, because he says that the United States of America ought not further to prosecute this cause against him, the defendant, because he says that the matters and things set forth in each of the counts of the aforesaid indictment have been duly compromised by the Government of the United States with this defendant in the manner and form as provided by law under the following circumstances, to-wit:

On the 24th day of September, 1910, this defendant offered and tendered to the Commissioner of Internal Revenue of the United States the sum of Four Thousand (\$4,000.00) Dollars, lawful money of the United States in full satisfaction and settlement of all civil and criminal liability for the identical offenses charged against this defendant in this indictment; that said Commissioner of Internal Revenue then and there duly accepted said amount from this defendant and deposited same in the United States Treasury; that on or about December 7, 1910, and after the acceptance of the said Four Thousand (\$4,000.00) Dollars as aforesaid, the defendant was advised that it would be necessary for him to deposit an additional One Thousand (\$1,000.00) Dollars with the said Commissioner of Internal Revenue, to consummate the final settlement of the matters and things set forth in the indictment aforesaid; that he thereupon on the said December 7, 1910, deposited with the Commissioner of Internal Revenue of the United States, the additional sum of One Thousand (\$1,000.00) Dollars, in like lawful money of the United States; that said Commissioner of Internal Revenue then and there duly accepted said amount from this defendant and said Commissioner deposited same in the United States Treasury; that thereafter an additional amount of Sixteen Thousand Nine Hundred and Forty Eight (\$16,498.00) Dollars was deposited with the Commissioner of Internal Revenue of the United States on December 13th, 1910, by this defendant and other defendants against whom indictments were then pending in this court bringing up the entire amount offered and tendered and deposited with the Commissioner of Internal Revenue to the sum of Twenty Seven Thousand (\$27,000.00) Dollars, said offer of compromise being in words and figures as follows, to-wit:

"CHICAGO, Dec. 13, 1910.

"Commissioner Internal Revenue, Washington, D. C.

"SIR: We herewith deposit the sum of Twenty-seven Thousand (\$27,000.00) Dollars and ask that the same be accepted in full compromise of all civil and criminal liabilities charged against us in an indictment now pending in the United States Court and growing out of transactions with the Illinois Fruit Distilling Co.

"OSCAR SCHREIBER AND
JACOB WEXLER.
DAVID SHAPIRO.
PHILIP BLUM.
HARRY ROSENSTEIN.
B. WEIS.
LOUIS MENDELSON.
A. TUCKER.
"H. ROSENFELD.
SIG. NATENBERG.
H. LEVINKIND.
I. KOHN.
WILLIAM SCHIMBERG."

42

And this defendant further avers that the said Commissioner of Internal Revenue then and there accepted said amount named in the last mentioned offer, as well as the other offers mentioned in this plea, in full settlement and satisfaction of any and all claims whether civil or criminal against this defendant in the above entitled cause, and said Commissioner did then and there duly deposit same in the Treasury of the United States.

And this defendant, therefore, pleads that a lawful compromise was then and there duly effected between the Government of the United States and this defendant, whereby the said defendant was released from any and all liabilities with respect to the subject matter contained in this indictment.

Wherefore he prays judgment if the United States ought further to prosecute the said indictment against him in respect to the offenses in said indictment mentioned, and that he, the said David Shapiro, may be dismissed and discharged from said indictment, and allowed to go without day, and of this, he puts himself upon the country.

SAMUEL SHAPIRO.

STEPHEN A. DAY,
E. N. ZOLINE,
Counsel for Defendant.

43 STATE OF ILLINOIS,
County of Cook, ss:

David Shapiro being duly sworn deposes and says that he is the defendant in the above entitled cause, that the foregoing pleas by

him subscribed was duly read by him and that the same is true in substance and in fact.

DAVID SHAPIRO.

Subscribed and sworn to before me this 15th day of March, 1912.
[SEAL.]

MAY E. EVENSEN,
Notary Public.

44 Endorsed: #4451. In the U. S. District Court, Northern District of Illinois. -United States vs. David Shapiro. Plea of Former Jeopardy. Filed Mar. 15, 1912, at 2 o'clock P. M. T. C. MacMillan, Clerk.

45 And afterwards, to wit, on the 10th day of May, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Plea of Former Jeopardy; same being in the words and figures following, to wit:

46 UNITED STATES OF AMERICA,
 Northern District of Illinois,
 Eastern Division:

No. 4451.

UNITED STATES
 vs.
DAVID SHAPIRO.

Plea of Former Jeopardy.

And the said David Shapiro in his own proper person cometh into court here, and having heard the said indictment read, saith, that the United States of America ought not further to prosecute the said indictment against him, the said David Shapiro, in respect to the offenses in the said indictment mentioned, because he says that on to-wit, the 24th day of January, A. D. 1910, the said David Shapiro, being the defendant in said cause, and being duly arraigned upon the said identical indictment filed herein against him, pleaded not guilty thereto; that afterwards on the 3rd day of January, 1911, he, the said defendant with the consent of the United States District Attorney, for the Northern District of Illinois, and by leave of the District Court of the United States for the Northern District of Illinois, Eastern Division, first had and obtained, withdrew his plea of not guilty heretofore entered, and being again arraigned upon the indictment aforesaid filed against him by leave of said Court and with the consent of the said United States District Attorney, pleaded nolo contendere thereto; whereupon it was ordered by the court that the cause be continued until January 17, 1911; that afterwards on the 17th day of January, 1911, the cause was, by order of court, continued; that afterwards on the 20th day of January, 1911; the matter came on for hearing

before the said District Court, and on motion of the said United States Attorney, a nolle prosequi was duly entered by said court as to the counts numbered 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13 of the aforesaid indictment; that on the said 20th day of January, 1911, said cause coming on to be heard in the said District Court on the plea of nolo contendere heretofore entered by this defendant in said cause, the court heard the evidence adduced by the respective parties and the statements of counsel, but not being sufficiently advised in the premises, took the cause under advisement.

And afterwards, to-wit, on the 23rd day of January, 1911, the said cause came on again to be heard in said District Court for sentence and thereupon the said District Court sentenced this defendant to be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for and during a period of two years and that he forfeit and pay to the United States a fine in the sum of ten thousand dollars besides the costs in this behalf expended, for which an execution was ordered to be issued.

That afterwards on, to-wit, the 3rd day of February, 1911, the said David Shapiro, the defendant in the above entitled cause did duly sue out a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit, to review said judgment and sentence; that on February 3rd, 1911, said writ of error was,

48 by an order of the Honorable Peter S. Grosscup, presiding Justice of the United States Circuit Court of Appeals, made a supersedeas; that on the 2nd day of May, 1912, the said United States Circuit Court of Appeals duly made and entered of record the following order:

1777.

"DAVID SHAPIRO

VS.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

"This cause coming on to be heard on the petition of the United States of America, defendant in error herein, for an additional bond on supersedeas, and the Court having heard arguments of counsel and being fully advised in the premises

"It is ordered, adjudged and decreed.

"1. That the order of supersedeas heretofore entered in this case on February 3, 1911, wherein and whereby the judgment and sentence of the District Court herein was ordered superseded, be, and the same is hereby modified and held for naught, so far as said supersedeas affects the rights of the United States of America to proceed by execution or otherwise for the enforcement of that portion of the sentence and judgment of the District Court herein whereby plaintiff in error was fined ten thousand dollars and costs,

and it is ordered that as to such portion of said order and superseas it is hereby vacated.

"2. It is further ordered that certified copy of this order be issued forthwith to the District Court for the Northern District of Illinois, notifying said Court of this order, authorizing said District Court to proceed with the enforcement and collection of said sentence so far as the fine of ten thousand dollars and costs is concerned."

as will more fully appear from a certified copy of said order, which is herewith attached, marked Exhibit 1, and made a part of this plea; that thereupon in pursuance to the order of the said United States Circuit Court of Appeals, and upon the direction of the District Attorney for the Northern District of Illinois, the Clerk of the United States District Court, did on May 2nd, 1911, duly issue an execution in due form against this defendant, David Shapiro, to enforce the collection of the aforesaid fine for the sum of

49, Ten Thousand (\$10,000) Dollars and Seven Hundred

Thirty Six and 75/100 (\$736.75) Dollars; that said execution was on May 3rd, 1911, duly delivered by the said United States District Attorney, to the United States Marshal for the Northern District of Illinois, who thereupon, on the same day, returned said execution, no property found and no part satisfied, as will more fully appear from a certified copy of the said execution, marked Exhibit 2, and made part of this plea.

That thereupon the United States did, on May 3rd, 1911, commence garnishee action in the United States Circuit Court for the Northern District of Illinois, to enforce the collection of the said fine, and that in pursuance to the direction of the United States District Attorney, a garnishee summons was duly issued against the Fort Dearborn National Bank, Chicago Clearing House Association, Len Small, Assistant Treasurer of United States, the West Side Trust & Savings Bank, and the Cook County State Savings Bank, to appear in said Circuit Court on the 1st day of the next term thereof, to be held at Chicago on the first Monday of July next, to answer as such garnishees; that said garnishee summons was duly served upon said Len Small, the Fort Dearborn National Bank of Chicago and the West Side Trust & Savings Bank. Thereupon the said Fort Dearborn National Bank filed its answer setting up in substance: That a draft on the sub-treasury of the United States for five thousand (\$5,000) Dollars, payable to the said David Shapiro, drawn by the United States, was deposited with said bank on May 2, 1911, and a Certificate of Deposit of said Bank, due three months after date issued to the said David Shapiro therefor on the same date for the same amount; that on May 3, 1911, the said draft was, in the ordinary course of business, sent to the Clearing House and credited to said Bank; that after the service on it of the writ issued in this cause, it was informed by the subtreasury of the United States that payment on the aforesaid draft had been stopped, and the said Bank, accordingly redeemed the said draft for five thousand (\$5,000.00) Dollars, and afterwards returned it to the said David Shapiro, and took up its

Certificate of Deposit which had been issued to the said David Shapiro.

That thereupon, on June 16, 1911, the following order was entered by the Honorable George A. Carpenter, United States District Judge Presiding in said Circuit Court:

"This cause having come on this day to be heard on Garnishee Summons and the Answer of Fort Dearborn National Bank, both of said parties having been represented by counsel, and the Court having heard the evidence and the arguments of counsel, and it appearing that the draft on the sub-treasury of the United States for Five Thousand (\$5,000.00) Dollars, payable to the said David Shapiro and drawn by the United States of America, referred to in the answer of the said garnishee, Fort Dearborn National Bank, is in the possession of S. M. Fitch, Collector of Internal Revenue for the United States of America, at Chicago, Illinois, it is ordered that the said cause be dismissed as to Fort Dearborn National Bank without costs."

All of which will more fully appear from a certified copy of the record, marked Exhibit 3, and made part of this plea. That the said \$5,000.00 has never been returned to this defendant and the money is in the hands of the United States and its authorized officials.

That on to-wit, January 2, 1912, the said United States Circuit Court of Appeals for the Seventh Circuit, duly reversed said judgment of the said District Court on the ground that the said
51 District Court erred in sentencing this defendant, David Shapiro, to imprisonment in the penitentiary in the manner and form as above recited and holding that under a plea of nolo contendere there can be no imprisonment imposed. The said Court of Appeals further held that it did not appear from the record before said Court of Appeals, that the plea of nolo contendere in behalf of this defendant, was accepted by the said District Court, and for this reason the said Court of Appeals reversed the judgment of the said District Court and remanded the cause to that Court with direction to accept or refuse acceptance of such pleas as tendered and proceed thereupon in conformity with law, as will more fully appear from the opinion of said Court, hereto attached, marked Exhibit 4, and made part of this plea.

And this defendant further avers that afterwards, on, to-wit, the 15th day of February, 1912, the United States District Attorney for the Northern District of Illinois filed the mandate of the said Court of Appeals in the above entitled cause, reversing said judgment of said District Court as aforesaid, and thereupon the cause was duly re-docketed in this Court.

Thereupon, to-wit, on said 15th day of February, 1912, the said United States District Attorney then and there moved the said District Court to reject and set aside the said plea of nolo contendere heretofore pleaded by this defendant in this Court, which motion was then and there resisted and objected to by this defendant and his counsel, but the said District Court then and there, against the objection of this defendant, without his consent, and without legal

necessity therefor, unlawfully and without right, then and there entered an order rejecting the said plea of nolo contendere
 52 heretofore entered by this defendant as aforesaid, and then and there directed this defendant to plead anew to the said indictment; that this defendant then and there refused to plead again to said indictment; thereupon the Court, on its own motion, entered a plea of not guilty for this defendant, and ordered him to appear for trial upon a day to be fixed by the court;

Wherefore, he, the said defendant says that the judgment against him, as to the fine, has been partly executed; that he has once before been in legal jeopardy of his life for the same offenses as charged in the indictment upon which he is now ordered to stand trial, and that he ought not further be prosecuted on account of the premises in said indictment contained and charged. This defendant specifically pleads the Fifth Amendment to the Constitution of the United States providing, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," in bar to the further prosecution of the defendant herein; that this defendant was once placed in legal jeopardy within the meaning of the said constitutional provision, and cannot be again tried therefor without violating said constitutional amendment, and avers that such trial would be without due process of law and the law of the land, and in violation of the said Fifth Amendment to the Constitution of the United States, and he hereby invokes the protection of the aforesaid constitutional amendments.

And this defendant further says that the said David Shapiro so indicted as aforesaid and who pleaded nolo contendere as above mentioned, is the same David Shapiro who is now before the Bar of this Court; that the plea of nolo contendere heretofore pleaded
 53 by this defendant was interposed to the same indictment upon which he is now ordered to stand trial; that the offenses are the same and the indictment identical.

This defendant further says that the said District Court of the United States as a Federal Court had full authority and jurisdiction of the subject matter and the person of this defendant, as set forth in said indictment.

Wherefore he prays judgment if the United States ought further to prosecute the said indictment against him in respect to the offenses in said indictment mentioned and that he, the said David Shapiro, may be dismissed and discharged from said indictment, and allowed to go without day, and of this he puts himself upon the country.

DAVID SHAPIRO, *Defendant.*

— — —
Counsel for Defendant.

STATE OF ILLINOIS,
 County of Cook, ss:

David Shapiro being duly sworn deposes and says that he is the defendant in the above entitled cause, that the foregoing plea by

him subscribed was duly read by him, and that the same is true in substance and in fact.

DAVID SHAPIRO.

Subscribed and sworn to before me this 9 day of May, 1912.
[SEAL.] LILLIAN SWANSTON,
Notary Public.

54 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten page, contains a true copy of the order entered herein on the second day of May, A. D. 1911, in the case of David Shapiro vs. United States of America No. 1777, October Term, 1910, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-third day of February, A. D. 1912.

[SEAL OF COURT.] EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of
Appeals for the Seventh Circuit.*

55 EXHIBIT 2.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

The United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you, That of the goods and chattels, lands and tenements of David Shapiro, Defendant, in your District, you cause to be made the sum of ten thousand dollars fine and Seven hundred thirty-six dollars and seventy-five cents costs, which The United States Plaintiff lately, to wit: on the 23rd day of January, A. D. 1911, in our District Court of the United States for the Northern District of Illinois, Northern Division, before the Judge thereof, at Chicago, in the District aforesaid, recovered against the said Defendant David Shapiro as a fine and costs for violation of the Internal Revenue Laws of the United States, as appears to us of record.

And have you that money at the Clerk's office of our said Court, in ninety days from the date hereof, to render to the said Plaintiff for its fine and costs aforesaid. And have you also then and there this writ.

Witness, the Hon. Kenesaw M. Landis, Judge of the District Court of the United States of America for said District, at Chicago aforesaid

this 2nd day of May in the year of our Lord, one thousand nine hundred and eleven and of our Independence the one hundred and 35th year.

[SEAL OF COURT.]

T. C. MacMILLAN, *Clerk.*

56 Endorsed: No. 4451. District Court of the United States, Northern District of Illinois, Eastern Division. The United States vs. David Shapiro. Fi. Fa. Fine \$10,000.00, Costs \$736.75. Judgment for \$10,736.75. Defendant's Costs. This Writ \$1.35. Collect \$10,738.10. Judgment rendered Jan. 23, 1911. T. C. MacMillan, Clerk. Filed May 3, 1911, at 1 o'clock P. M. T. C. MacMillan, Clerk. Edwin W. Sims, Plaintiff's Attorney.

This writ was received in my office at Chicago, Illinois, at 12:20 P. M. May 3, 1911. Luman T. Hoy, U. S. Marshal, by W. H. Wilmot, Deputy.

I have made diligent inquiry and find no property of the within named defendant, David Shapiro, within my District and I therefore return this writ "No Property found and in no part satisfied, this 3rd day of May, A. D. 1911. Luman T. Hoy, U. S. Marshal, by W. H. Wilmot, Deputy.

57 In the United States District Court for the Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America, for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of Fi. Fa. in Case No. 4451, wherein United States is Plaintiff and David Shapiro is Defendant, as same appears from the original filed in said Court on the 3rd day of May, A. D. 1911 and now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 1st day of May A. D. 1912.

[SEAL.]

T. C. MacMILLAN, *Clerk.*

58

EXHIBIT 3.

30398.

DAVID SHAPIRO for the Use of UNITED STATES OF AMERICA
vs.

FORT DEARBORN NATIONAL BANK et al., Garnishees.

Garnishee Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the Marshal of the Northern District of Illinois, Greeting:

Whereas A Judgment was rendered in said District Court of the United States, Northern District of Illinois, on the twenty-third day

of January A. D. 1911, in favor of the United States of America, against David Shapiro for the sum of ten thousand dollars and no cents and \$736.75 costs, and upon said Judgment execution has been duly issued and returned by the Marshal of said district, endorsed "I have made diligent inquiry and find no property of the within named defendant, David Shapiro within my District and I therefore return this writ No Property Found and in no part satisfied, this 3rd day of May, A. D. 1911."

And whereas affidavit has been made and filed in said Court, setting forth that said defendant David Shapiro has no property, within the knowledge of the affiant in his possession liable to execution and that he has just reason to believe that Fort Dearborn National Bank, Chicago Clearing House Association, Len Small, Assistant Treasurer of the United States, the West Side Trust & Savings Bank, and the Cook County State Savings Bank, are indebted to said defendant, David Shapiro, and have effects and estate of said defendant in their possession, custody and charge.

We Therefore Command You to Summon Fort Dearborn National Bank Chicago Clearing House Association, Len Small, Assistant Treasurer, of the United States, the West Side Trust & Savings Bank, and the Cook County State Savings Bank if found in your district, to be and appear before our Judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of July next, to answer as such garnishees in said cause and to abide such order or Judgment as shall be made or rendered in the premises, and have you then and there this writ.

Witness, the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this third day of May, in the year of our Lord one thousand nine hundred and eleven, and of our independence the 135th year.

JOHN H. R. JAMAR, *Clerk*.

By ARTHUR E. CLAUSSEN, *Deputy*.

I have executed this writ within my district in the following manner, to wit:

Upon the within named Len Small, Assistant Treasurer of the United States, by delivering a true copy thereof, personally, to F. C. Russell, Cashier of the Sub-Treasury at Chicago at 2:29 P. M. May 3, 1911.

Upon the within named Fort Dearborn National Bank at Chicago, by delivering a true copy thereof, personally to H. R. Kent, Cashier of said bank at 2:33 P. M. May 3, 1911.

Upon the within named West Side Trust and Savings Bank at Chicago, by delivering a true copy thereof, personally to Benj. S. Mayer, President of said bank at 4:20 P. M. May 3, 1911,
60 and upon the within named Chicago Clearing House Association at Chicago, by delivering a true copy thereof, personally to W. D. C. Street, Manager at 10:44 A. M. May 4, 1911.

I was unable to find the Cook County Savings Bank within my district, this 4th day of May, A. D. 1911.

LUMAN T. HOY,

U. S. Marshal,

By W. H. WILMOT, *Deputy.*

Marshal's fees:

4 services	\$8.00
4 miles travel24
	<hr/>
Travel	\$8.24

(Endorsed:) Filed May 6, A. D. 1911, John H. R. Jamar, Clerk.

Answer of Fort Dearborn National Bank.

UNITED STATES OF AMERICA,

Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for said District.

Gen. No. 30398.

DAVID SHAPIRO for the Use of UNITED STATES OF AMERICA

vs.

FORT DEARBORN NATIONAL BANK et al., Garnishees.

Answer of Fort Dearborn National Bank.

And now comes the Fort Dearborn National Bank, a corporation of Chicago, Illinois, summoned as garnishee herein, and for answer says:

That a draft on the subtreasury of the United States for five thousand (\$5,000.00) Dollars, payable to the said David Shapiro, drawn by the United States, was deposited with said bank on May 2, 1911, and a Certificate of Deposit of said Bank, due three months after date issued to the said David Shapiro therefor on the same date for the same amount; that on May 3, 1911, the said draft was, in the ordinary course of business, sent to the Clearing House and credited to said bank; that after the service on it of the writ issued in this cause, it was informed by the subtreasury of the United States that payment on the aforesaid draft had been stopped, and the said bank, accordingly redeemed the said draft for five thousand (\$5,000.00) Dollars, and afterwards returned it to the said David Shapiro, and took up its Certificate of Deposit which had been issued to the said David Shapiro.

FORT DEARBORN NATIONAL BANK,
By G. H. WILSON,
Assistant Cashier.

STATE OF ILLINOIS,
County of Cook, ss:

G. H. Wilson, being first duly sworn, deposes and says that he is Assistant Cashier of the Fort Dearborn National Bank, a corporation, that he is authorized on behalf of the said Bank to make the foregoing answer; that he has read the foregoing answer by him subscribed on behalf of said Bank and knows the contents thereof, and that the same is true in substance and in fact.

G. H. WILSON.

Subscribed and sworn to before me, this 3rd day of June, A. D. 1911.

[SEAL.]

DWIGHT S. BOBB,
Notary Public.

(Endorsed:) Filed June 7, 1911, John H. R. Jamar, Clerk.

62 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Present: The Honorable George A. Carpenter, District Judge.

No. 30398.

DAVID SHAPIRO for the Use of UNITED STATES OF AMERICA
vs.

FORT DEARBORN NATIONAL BANK et al., Garnishees.

This cause having come on this day to be heard on Garnishee Summons and the Answer of Fort Dearborn National Bank, both of said parties having been represented by counsel, and the Court having heard the evidence and the arguments of counsel, and it appearing that the draft on the Subtreasury of the United States for Five Thousand (\$5,000.00) Dollars, payable to the said David Shapiro and drawn by the United States of America, referred to in the answer of the said garnishee, Fort Dearborn National Bank, is in the possession of S. M. Fitch, Collector of Internal Revenue for the United States of America, at Chicago, Illinois, it is Ordered that the said cause be dismissed as to Fort Dearborn National Bank without costs.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I. T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be true and complete copies of the certain Garnishee Summons, issued out of the Clerk's office of the Circuit Court of the United States for the Northern District of Illinois, on the third day of May, 1911, returned with the Marshal's service

thereon endorsed and Filed May 6, 1911, Answer of Fort Dearborn National Bank, filed June 7, 1911, and Order entered of Record on the sixteenth day of June, 1911, in the cause entitled David Shapiro, for the use of United States of America vs. Fort Dearborn National Bank, et al., Garnishees, as the same appear from the original Records and Files thereof, now remaining in my custody and control.

In witness whereof, I have hereunto set my hand and affixed the seal of the District Court, at my office, in the City of Chicago, in said District, this twenty-fourth day of February, A. D. 1912.

[SEAL OF COURT.]

T. C. MacMILLAN, *Clerk*,
By JOHN H. R. JAMAR,
Deputy Clerk.

Endorsed: Gen. No. 4451. In the U. S. District Court, Northern District of Illinois. United States vs. David Shapiro. Plea of Former Jeopardy. Filed May 10, 1912, in open court, at 10 o'clock A. M. T. C. MacMillan, Clerk.

64 And afterwards, to wit, on the 10th day of May, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, Demurrer to Plea; same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

No. 4451.

UNITED STATES
v.
DAVID SHAPIRO.

Demurrer to Plea of Former Jeopardy.

And James H. Wilkerson, who prosecutes for the said United States in this behalf as to the said plea of former jeopardy of the said David Shapiro by him above pleaded to the indictment in the above entitled cause, saith, that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said United States from prosecuting the said indictment against him, in said David Shapiro; and that the said United States is not in law bound to answer the same; and this the said James H. Wilkerson, who prosecutes as aforesaid, is ready to verify; wherefor for want of a sufficient plea in this behalf, he, the said James H. Wilkerson, for the said United States prays judgment, and that the said David Shapiro may be convicted of the premises in the said indictment specified.

JAMES H. WILKERSON,
United States Attorney,
E. G.

Endorsed: No. 4451. In the District Court of the United States for the Northern District of Illinois. Eastern Division. United States of America vs. David Shapiro. Demurrer to Plea of Former Jeopardy. Filed May 10, 1912, at 4:20 o'clock P. M. T. C. MacMillan, Clerk. James H. Wilkerson, United States Attorney.

65 And afterwards, to wit, on the 10th day of May, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

UNITED STATES
vs.
DAVID SHAPIRO.

On reading the petition of the defendant, David Shapiro, and the Court being duly advised in the premises, it is Ordered that the motion of defendant for a rule on the Commissioner of Internal Revenue and the Secretary of the Treasury to produce at the trial of the above entitled cause, on or before May 15th, 1912, all original papers, or certified copies of same, relating to the application for compromise in the matter of the said David Shapiro and the Illinois Fruit Distillery Company, which bear upon the subject matter of the indictment against the said David Shapiro, be and the same is hereby denied, to which ruling of the Court, the defendant David Shapiro, by his attorney, duly excepts.

66 And afterwards, to wit, on the 10th day of May, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come the parties by their attorneys and the defendant in his own proper person and on motion of said defendant leave is given him to file an additional plea of former jeopardy instanter, and it is further Ordered that the United States Attorney reply to said additional plea instanter and this cause is set for trial on June 19, 1912.

67 And afterwards, to wit, on the 11th day of June, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come the parties by their attorneys and the Court having heretofore heard the arguments of Counsel and considered the briefs filed on demurrer of the United States to the plea of former jeopardy filed by the defendant herein on May 10, 1912, and being fully advised in the premises, sustains said demurrer to which ruling and order of the Court said defendant by his attorney duly excepts.

68 And afterwards, to wit, on the 25th day of June, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bill of Exceptions; same being in the words and figures following, to wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 4451.

UNITED STATES OF AMERICA
vs.
DAVID SHAPIRO.

Bill of Exceptions.

Be it known that on the 11th day of June, A. D., 1912, the demurrer filed by the United States to the plea of former jeopardy filed by the defendant on the 10th day of May, 1912, was duly sustained by the court, and the defendant then and there duly excepted to the order of the court sustaining said demurrer, and the defendant's exceptions are duly allowed, and this bill of exceptions settled and allowed.

Be it further known that on the 17th day of June, A. D. 1912, the several demurrers of the United States to the several pleas of former jeopardy filed by the defendant on the 15th day of March, 1912, were duly sustained by the court, and the defendant then and there duly excepted to each of the orders of the court sustaining said demurrers, and the defendant's exceptions are duly allowed, and this bill of exceptions settled and allowed.

Done in open court, this 25th day of June, A. D. 1912.

O. K.

CARPENTER, *Judge.*

H. W. FREEMAN,
Ass't U. S. Att'y.

69 Endorsed: Gen. No. 4451. In the District Court. United States of America vs. David Shapiro. Bill of Exceptions. Filed June 25, 1912 at 10 o'clock A. M. T. C. MacMillan, Clerk. Elijah N. Zoline, Attorney and Counselor.

70 And afterwards, to wit, on the 17th day of June, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES
vs.
DAVID SHAPIRO.

Come the parties by their attorneys and on motion of said defendant leave is given him nunc pro tunc June 11, 1912, to file his bill of exceptions herein.

71 And afterwards, to wit, on the 17th day of June, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Demurrer to Plea, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division:

In the District Court Thereof, May Term, A. D. 1912, ss:

No. 4451.

UNITED STATES OF AMERICA
v.
DAVID SHAPIRO.

Demurrer to Plea of Former Jeopardy.

And James H. Wilkerson, who prosecutes for the said United States in this behalf, as to the said plea of the said David Shapiro by him above pleaded to the indictment in the above entitled cause and filed herein on the fifteenth day of March, 1912, wherein the said David Shapiro avers that he has once before been in legal jeopardy of his life for the same offenses charged in the indictment herein, saith that the same and the matters herein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said United States from prosecuting the said indictment against him, the said David Shapiro and that the said United States is not in law bound to answer the same; and this the said James H. Wilkerson, who prosecutes as aforesaid, is ready to verify;

Wherefore, for want of a sufficient plea in this behalf, he, the

said James H. Wilkerson, for the said United States, prays judgment, and that the said David Shapiro may be convicted of the premises in the said indictment specified.

J. H. WILKERSON,
United States Attorney.

Endorsed: No. 4451. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. David Shapiro. Demurrer to Plea of Former Jeopardy. Filed June 17, 1912. T. C. MacMillan, Clerk.

72 And afterwards, to wit, on the 17th day of June, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Demurrer to Plea, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division:

In the District Court Thereof, May Term, A. D. 1912, ss:

No. 4451.

UNITED STATES OF AMERICA
v.
DAVID SHAPIRO.

Demurrer to Plea of Compromise.

And James H. Wilkerson, who prosecutes for the said United States in this behalf, as to the said plea of the said David Shapiro by him above pleaded to the indictment in the above entitled cause and filed herein on the fifteenth day of March, 1912, wherein the said David Shapiro alleges full settlement and satisfaction of all civil and criminal claims on the part of the said United States against the said defendant, saith that the same and the matters herein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said United States from prosecuting the said indictment against him, the said David Shapiro and that the said United States is not in law bound to answer the same; and this the said James H. Wilkerson, who prosecutes as aforesaid, is ready to verify;

Wherefore, for want of a sufficient plea in this behalf, he, the said James H. Wilkerson, for the said United States, prays judgment, and that the said David Shapiro may be convicted of the premises in the said indictment specified.

J. H. WILKERSON,
United States Attorney.

Endorsed: No. 4451. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. David Shapiro. Demurrer to Plea of Compromise. Filed June 17, 1912. T. C. MacMillan, Clerk.

73 And afterwards, to wit, on the 17th day of June, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES

VS.

DAVID SHAPIRO.

This cause coming on to be heard on the demurrers of the plaintiff this day filed herein to the pleas of former jeopardy, come the parties by their attorneys and the hearing proceeds to conclusion, whereupon the Court being fully advised in the premises, sustains said demurrers and grants leave to said defendant to file his bill of exceptions by June 30, 1912, and it is further Ordered by the Court that this cause be and hereby is continued for trial

74 And afterwards, to wit, on the 16th day of October, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES

VS.

DAVID SHAPIRO.

This being the day and hour to which the further trial of this cause was on yesterday continued come again the parties by their attorneys and the defendant in his own proper person, comes also the jury who were duly elected empaneled and sworn herein as aforesaid, and the said jury having heard the evidence by the parties adduced, arguments of counsel and charge of the Court, render their verdict and upon their oath do say, we, the jury, find the defendant David Shapiro, guilty as charged in the indictment, and thereupon said defendant by his attorney enters his motion for a new trial.

75 And afterwards, to wit, on the 17th day of October, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES

VS.

DAVID SHAPIRO.

Come the parties by their attorneys and on motion it is Ordered by the Court that the hearing of the motion of the defendant for a new trial, herein be set for November 9, 1912, at ten o'clock A. M.

76 And afterwards, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for Writ of Error; same being in the words and figures following, to wit:

77 UNITED STATES OF AMERICA
vs.
DAVID SHAPIRO.

To the Honorable George A. Carpenter, Judge of the District Court of the United States for the Northern District of Illinois:

And now comes David Shapiro, the defendant in the above entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States for the Northern District of Illinois, entered on the 11 day of November, 1912, hereby petitions for an order allowing him said defendant to prosecute a writ of error from the Supreme Court of the United States to the District Court of the United States for the Northern District of Illinois, under and according to the laws of the United States in that behalf made and provided, and that said writ of error may be made a supersedeas, and your petitioner be released on bail in an amount to be fixed by Your Honor pending the final disposition of said writ of error. Assignment of errors is filed with this petition.

DAVID SHAPIRO,
By ELIJAH N. ZOLINE,
His Attorney.

78 Endorsed: Gen. No. 4451. United States vs. David Shapiro. Petition for writ of error. Filed in open court Nov. 9, 1912. T. C. MacMillan, Clerk.

79 And afterwards, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors, same being in the words and figures following, to wit:

80 UNITED STATES OF AMERICA
vs.
DAVID SHAPIRO.

Assignment of Errors.

And now comes David Shapiro, the plaintiff in error, and in connection with his petition for a writ of error says that in the record, proceedings and judgment aforesaid, error has intervened to his prejudice, and hereby files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause, viz:

First. The Honorable K. M. Landis, Judge of the District Court of the United States erred in denying the defendant's petition for a

change of venue on the ground of the prejudice of said Judge against the defendant.

Second. The District Court of the United States for the Northern District of Illinois erred in setting aside the defendant's plea of *nolo contendere* heretofore entered against the objection of the defendant and in entering a plea of not guilty for the defendant on motion of the Court.

Third. The District Court of the United States for the Northern District of Illinois erred in sustaining the demurrer of the United States to the plea of the defendant filed by him on the 10 day of May, 1912.

Fourth. The District Court of the United States for the Northern District of Illinois erred in sustaining the demurrer of the United States to the plea of the defendant filed by him on the 15 day of March, 1912.

80½ Fifth. The District Court of the United States for the Northern District of Illinois erred in sustaining the demurrer of the United States to the plea of the defendant filed by him on the 15 day of March, 1912.

Sixth. The court erred in sustaining each and every demurrer to each and all the pleas of the defendant and by holding and deciding that the facts stated in each of said pleas were not sufficient to constitute a bar to the further prosecution of the defendant under the indictment in this case, and in denying to the defendant the constitutional guarantees relied upon by him in said pleas.

Seventh. The Court erred in not holding that the defendant was and is entitled to his liberty under the Fifth Amendment to the Constitution of the United States, pleaded by him in his respective pleas.

Eighth. The Court erred in overruling the motion of the defendant for new trial.

Ninth. The Court erred in overruling and denying the motion of the defendant in arrest of judgment.

Tenth. The Court erred in entering the judgment against the defendant upon the verdict in this case.

Eleventh. The judgment of the court is contrary to law.

Twelfth. The verdict of the jury is not supported by the evidence in the case, and there is no evidence in the record to sustain the specific counts in the indictment.

Wherefore said plaintiff in error prays that the said judgment of the District Court of the United States may be reversed and held for naught, etc.

DAVID SHAPIRO,
By ELIJAH N. ZOLINE,
Attorney for Plaintiff in Error.

81 Endorsed: 4451. United States of America vs. David Shapiro. Assignment of Errors. Filed in open Court this Nov. 9, 1912. T. C. MacMillan, Clerk.

82 And afterwards, to wit, on the 9th day of November, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond; same being in the words and figures following, to wit:

83 Know all men by these presents, That I, David Shapiro, of the County of Cook, State of Illinois, as principal, and Bernard Horwich and Hurde Shapiro, of County of Cook, State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five thousand dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of November, in the year of our Lord, One Thousand Nine Hundred and Twelve.

Whereas, Lately on the 9th day of November, 1912, at the November Term, 1912, of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and David Shapiro, Defendant, a judgment and sentence were rendered against said David Shapiro, and said David Shapiro obtained a Writ of Error from the Supreme Court of the United States to the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Supreme Court at the City of Washington, thirty days from and after the date thereof, which citation has been duly served.

84 Now the condition of said obligation is such, that if the said David Shapiro shall appear in person in the Supreme Court of the United States when said cause is reached for argument or when required by law or rule of said Court, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the Supreme Court of the United States, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for a trial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Supreme Court, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

DAVID SHAPIRO. [SEAL.]

BERNARD HORWICH. [SEAL.]

her

HURDE x SHAPIRO. [SEAL.]

mark.

Witness to mark of Hurde Shapiro:

E. N. ZOLINE.

ALEX. I. HERSHFIELD, M. D.

Approved by:

CARPENTER, Judge.

9 Nov., 1912.

85 Endorsed: Gen. No. 4451. In the U. S. District —, Northern District of Illinois. United States of America vs. David Shapiro. Bond. Filed in open Court Nov. 9, 1912. T. C. Mac-Millan, Clerk.

85½ And afterwards, to wit, on the 9th day of November, A. D. 1912, the following order was had and entered of record in said cause, to wit:

UNITED STATES

vs.

DAVID SHAPIRO.

Let a writ of error be allowed from the Supreme Court of the United States to the District Court of the United States for the Northern District of Illinois as prayed for in the usual form as provided by law.

86 And afterwards, to wit, on the 9th day of November, A. D. 1912, the following order was had and entered of record in said cause, to wit:

DAVID SHAPIRO, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Whereas, the undersigned, a Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, allowed a writ of error, and signed a citation in the above-entitled cause on Nov. 9th, 1912, and, it now appearing that a citation has been served in the cause, in pursuance of the power vested in me by law, and Rule Thirty-six of the Supreme Court of the United States, it is now ordered that the writ of error, allowed as above stated, operate as a supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of Five Thousand Dollars conditioned according to law.

87 And afterwards, to wit, on the 9th day of November, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES

vs.

DAVID SHAPIRO.

This cause coming on for hearing on the motion of the defendant for a new trial herein, come the parties by their attorneys and the Court having heard the arguments of counsel and being fully advised in the premises, orders that said motion be and the same hereby is overruled to which order of the Court said defendant by his attor-

ney duly excepts, and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and ordered by the Court and is the sentence and judgment of the Court upon the verdict of guilty rendered by the jury herein as aforesaid that the defendant David Shapiro, be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for and during a period of two years and that he forfeit and pay to the United States a fine in the sum of five thousand dollars, (\$5,000.00) for which let execution issue.

88 And afterwards, to wit, on the 5th day of December, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

UNITED STATES
vs.
DAVID SHAPIRO.

Ordered that the time within which the bill of exceptions is to be filed is hereby extended 30 days from Dec. 9, 1912.

89 And afterwards, to wit, on the 5th day of December, A. D. 1912, the following order was had and entered of record in said cause, to wit:

4451.

UNITED STATES
vs.
DAVID SHAPIRO.

Whereas the undersigned, Judge of the District Court of the United States for the Northern District of Illinois, has heretofore signed a citation and allowed a writ of error from the Supreme Court of the United States to the District Court of the United States for the Northern District of Illinois, and whereas the bill of exceptions in said cause has not yet been settled and is pending judicial approval, and for good cause shown, it is ordered that the time within which the transcript of the record is to be filed in the Supreme Court of the United States be and is hereby extended 30 days from Dec. 9th, 1912.

GEORGE A. CARPENTER,
District Judge.

90 And afterwards, to wit, on the 4th day of January, A. D. 1913, the following order was had and entered of record in said cause, to wit:

4451.

THE UNITED STATES

vs.

DAVID SHAPIRO.

Come the parties by their attorneys, and on motion of the defendant by E. N. Zoline, Esq., his attorney and for good cause shown, It is ordered by the Court that the time within which said defendant shall file his record in the Supreme Court of the United States be and the same hereby is enlarged ten days.

GEORGE A. CARPENTER,

District Judge.

91 And afterwards, to wit, on the 4th day of January, A. D. 1913, there was filed in the Clerk's Office of said Court, in said Cause, a Bill of Exceptions; same being in the words and figures following, to wit:

92 In the District Court of the United States, Northern District of Illinois.

UNITED STATES

vs.

DAVID SHAPIRO.

Stenographic Report.

CHICAGO, ILL., Oct. 10, 1912.

Witnesses.	Direct.	Cross.	Redirect.	Recross.
Frank E. Hemstreet.....	3	9
John C. Jones.....	9	11
W. P. Smith.....	12	46	61	...
W. G. Beach.....	63	65
S. Bronstein	65	85	120	135
Frank Weiss	140	148	169	...
John Mullen	172	173

Minnie M. Meyer, Court Reporter, Ashland Block, Chicago. Tela.
Ran. 882.

93 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the District Court of the United States for the Northern District of Illinois, October Term, A. D. 1912.

UNITED STATES

vs.

DAVID SHAPIRO.

Indictment for —.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 10th day of October, A. D. 1912, being one of the days of said term of said court, before his Honor, George A. Carpenter, one of the judges of said court, and a jury, this cause came on for trial upon the indictment heretofore found herein, the defendant having entered a plea of —.

Harry A. Parkin and Henry W. Freeman, appearing for the Government.

Elijah N. Zoline, Patrick H. O'Donnell, and Willard M. McEwen appearing for the defendants.

94 Mr. ZOLINE: Before we proceed with the trial, on behalf of the defendant, we object to being tried here, and we claim our constitutional guaranties, former jeopardy, etcetera, as set forth in the pleas. Then, again, I notice in the 219th United States Reports there is a case that, notwithstanding the demurrers are sustained to the pleas, you must offer evidence to sustain your point. Now, I am ready to offer that evidence, but I do not want to take the time to do so unless the Court so desires, but I want the record to show that the Court rules that he will not permit any evidence to be introduced touching the matters set forth in the pleas.

The COURT: The record may show that, but it seems to me that the demurrer sets up the facts.

Mr. ZOLINE: And the defendant excepts to it, so he will not be presumed to have waived this point.

The COURT: Every question that is in this case will be preserved in the record.

Thereupon the jury was duly empaneled and sworn to try the issues.

95 And thereupon the Government, to maintain the issues on its part, introduced the following evidence, to wit:

FRANK E. HEMSTREET, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. PARKIN:

My name is Frank E. Hemstreet; I reside at Chicago, Illinois; I am a Deputy Collector of Internal Revenue; my office is at 626 Fed-

eral Building; I have general supervision of the office; I was occupying such office during the year 1910.

I am acquainted with the defendant, David Shapiro; I have known him for several years, I could not tell you just how many offhand.

To my knowledge he has been engaged and connected with the liquor business in some way or another during the last fifteen years. The defendant made application to my office during the years 1908 and 1909 for license as retail and wholesale liquor dealer. I have those applications (producing papers).

Said papers were marked Government's Exhibits 1 and 2.
96 Government's Exhibits 1 and 2 were signed and sworn to by the defendant. They are Returns for Special Tax, wholesale and retail dealer; by "Return" is meant application for special tax.

Mr. PARKIN: I will offer these in evidence as Exhibits 1 and 2.

Government Exhibit 1 is a sworn application by the defendant dated July 6, 1908, declaring that on July 1st, 1908, he intends to engage in the wholesale and retail liquor business at 569-571 South Halsted Street, Chicago.

Government Exhibit 2 is an exact duplicate of said Exhibit 1, except that the application was made on the 9th day of July, 1909, for the same place and was sworn to on same day.

97 "W. and R. L. D." serves as wholesale and retail liquor dealer.

There was a duplicate or similar one for the next year. This one is dated and sworn to on the 9th day of July, and paid for on the 28th of July, the sum of \$125. It is an exact duplicate practically of this other one. Those two applications cover the period from July 1st until the June 30th of the succeeding year, one fiscal year. So that he was in business from the 1st of July, 1908 up to the 30th day of June, 1910. At the time those receipts were left at my office a special tax stamp was issued, one as wholesale and the other as retail liquor dealer.

The defendant made a return or application as rectifier on the 1st day of September, 1908, for the period ending June 30, 1909; and again on the 1st day of August, 1909, for the period commencing August 1, 1909 and ending June 30, 1910.

Q. Was there an amended application?

A. These other papers (indicating) are notices that each rectifier would file in our office after he has paid his tax, showing his name, the name and style under which he is doing business, who owned the building, what his method of rectification is, what he is to produce and what other business he is engaged in and whoever is engaged in the business.

98 I have no record of anything after July, 1910. These two exhibits are signed and sworn to by David Shapiro.

Mr. PARKIN: I offer these in evidence as Government Exhibits 3 and 4 (two papers).

Said documents were admitted in evidence and marked Government's Exhibits 3 and 4, and are applications by the defendant, one

made on August 1st, 1909, and the other on September 1st, 1908, as a rectifier—less.

99 The WITNESS (continuing): These (Government's Exhibits 3 and 4) are notices by rectifiers. Notice of rectifier, Chicago, August 2, 1909, was signed by David Shapiro and presented at our office. I don't know where it was signed.

Mr. PARKIN: I offer that in evidence as Government Exhibit No. 5.

Said document was admitted in evidence and marked Government Exhibit 5, and is a notice by the defendant in due form dated August 2, 1909, that after August 1st, 1909, he will adopt the compound process for rectification at his place of business, 569 South Halsted Street, Chicago.

100 The WITNESS: This paper, dated December 3, 1908, is an amended notice, signed by Mr. Shapiro, and filed in our office. Another one, dated 8/18/08 was signed by him and filed in our office.

Mr. PARKIN: I offer those as Government Exhibits 6 and 7.

Said papers were admitted in evidence and marked Government's Exhibits 6 and 7, and are in substance the same as Exhibit 5 except that Exhibit 6 is for the period of September 1st, 1908, and Exhibit 7 is an amended application being a mere duplicate in form, but Exhibit 5, dated Aug. 2, 1909 shows an estimated rectifying capacity of 400 gallons every twenty-four hours, is compared with an estimated capacity of 100 gallons every twenty-four hours in exhibit 6, dated Aug. 18, 1908, and Exhibit 7, dated Dec. 3, 1908.

101 Cross-examination by Mr. McEWEN:

Q. Your work is confined to your office in the building here?

A. No, sir; so far as Mr. Shapiro is concerned, mostly so. My duties are charge of the office and supervision of the district. In connection with any of the documents shown me I did not have occasion to go to Mr. Shapiro's place of business. My connection with these documents simply consisted in receiving them or seeing them at the office here in this building.

JOHN C. JONES, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. FREEMAN:

My name is John C. Jones; deputy collector of internal revenue, 1st District, Illinois; my office is in this building.

I receive all the wholesale reports from the wholesale dealers in the district, wholesale liquor dealers.

102 They are required to file reports 52 A and 52 B and 338. This is a report of what they receive and what they dispose of during the month. These are the monthly reports of David Shapiro for the years from July 1908, to July, 1910 (producing papers). They are a part of the records in my department. I am

the J. C. Jones in whose presence the defendant David Shapiro acknowledged these.

Mr. PARKIN: I offer these in evidence and ask that they be marked as Government Exhibits 8 to 28 inclusives.

Said documents were admitted in evidence and marked Government Exhibits 8 to 28 inclusive, and tend to show that the defendant reported to the Government during the period from September 23, 1908, to March 1st, 1910, the total amount of three thousand three hundred sixty two and 0.9 proof gallons as having been received by him from the Illinois Fruit Distilling Company.

103 Cross-examination by Mr. McEWEN:

Mr. Shapiro brought them in (referring to Government Exhibits 8 to 27) somewhere between the 8th and 10th of every month and swore to them. They are in a large book and they tear them out and keep a duplicate of them; they are put up in book form in the place of business of Shapiro. It is made up in duplicate by means of a carbon copy, then when the report is made out the leaf is torn out; one copy is brought to the Revenue office in this building and the other copy remains in the book or on file at the place of business of Shapiro.

I have not been over these tabulations (Government Exhibits 8 to 27) to discover how many gallons were reported myself. When these are placed on file in the main office there is no record made from this sheet; it is kept as an original file.

104 W. P. SMITH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. PARKIN:

My name is W. P. Smith; I live in Chicago; I am a special U. S. gauger of the Internal Revenue Department; I have occupied that position about 19 years last past.

I have general supervision of distilled spirits as handled by the distillers, wholesale liquor dealers and rectifiers as inspected by the United States Internal Revenue Gaugers.

Q. Will you explain about the taxation, the method of taxation of distilled spirits?

Mr. ZOLINE: Objected to; it is a matter of law.

The COURT: Objection sustained.

Mr. PARKIN:

Q. Now refer to the Revised Statutes (handing book to witness) and then hand it back to me and I will read it.

The WITNESS: Sections 3250 and 3251—

Mr. ZOLINE: I object to reading the statutes because it is not evidence here; that is a matter for construction on the part of the court.

If they want to call the court's attention to any statute; I don't think it should go to the jury now.

105

Mr. PARKIN: I am going to offer it in evidence.

The COURT: It seems to me it is such a simple matter—I admit it technically is not proper—but if the statement of the witness is a clear and succinct statement of the law, aren't we better in letting him do it in that way? There is always an opportunity to compare it with the statute, and if there is any discrepancy, it may easily be corrected.

Mr. ZOLINE: No; we stand on our objection.

The COURT: Go ahead, Mr. Parkin.

To which ruling of the court the defendant by his counsel then and there duly excepted.

Mr. PARKIN: I will offer in evidence Sections 3250 and 3251.

Mr. ZOLINE: Objected to.

The COURT: Objection overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. PARKIN: I will read now Section 3251A of the Revised Statutes, Sec. 48, Act of August 28, 1894, 28 Statutes at Large, page 509 as follows (reading):

106 Mr. PARKIN:

Q. Mr. Smith, will you please tell me what the term "in bond" means?

Mr. ZOLINE: Objected to.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. Distilled spirits, at the time of manufacture, are placed in barrels and entered in a Government bonded warehouse; they are kept under lock and key under the care of a storekeeper until the distiller wishes to tax pay; the storekeeper is a United States employé in charge of the distillery warehouse.

I have been engaged in the business of looking after, supervising or inspecting distilleries and persons engaged in warehousing of distilled liquors, wholesale and retail liquor dealers and others engaged in selling spirits, in excess of nineteen years. In that time I have covered all the states—New York, Pennsylvania, New Jersey, Ohio, Connecticut, Illinois, Michigan, Minnesota, Nebraska, Iowa, Kentucky, Arkansas, Missouri, Arizona, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, North Dakota and South Dakota. I believe that covers the territory.

I have examined many thousands of gallons of various kinds of distilled liquors; approximately in the last nineteen years I have come in contact with and inspected several million gallons at least, whiskey, brandy, rum, gin, alcohol, spirits, cordials, liqueurs, all the liquors known to the trade.

Q. I will ask you whether or not in your experience, without repeating all of it, you have come across the term "proof gallon"?

A. Yes.

Mr. ZOLINE: That is objected to.

The COURT: Objection overruled.

To which ruling of the court, the defendant by counsel, then and there duly excepted.

The WITNESS: "Proof gallon," as determined by the Internal Revenue Department, consists of about 53 parts water to 50 parts of alcohol. A proof gallon at 100 per cent proof is practically the same as a wine gallon.

The COURT:

Q. Is that the rule of the Revenue Department?

A. That is their interpretation of the law; the law reads that way.

Mr. ZOLINE: I object to that.

108 The COURT:

Q. Does the law read that way, or is that the result of a bulletin from the Revenue department?

A. The statute defines what a proof gallon shall be.

The COURT: The objection will be sustained and the answer stricken from the record.

The WITNESS: Section 3249 Revised Statutes.

Mr. PARKIN: If the court please, I offer Section 3249 in evidence.

Mr. ZOLINE: It is objected to; we don't need to pile up this record—

The COURT: Objection overruled.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Mr. PARKIN: (reading Section 3249):

109 Mr. O'DONNELL: I move that it be stricken out as not in any wise proving the issue in this case.

The COURT: The part that related to the proof gallon is I think pertinent to the issues in this case as it was outlined to the jury. But the hydrometers—

Mr. PARKIN: I read it because it is a portion of it.

The COURT: The rest it seems to me is absolutely unnecessary.

Mr. ZOLINE: I should think if they introduce the statute the statute should not be received unless the regulations of the Internal Revenue office has said the secretary or the commissioner of Internal Revenue shall prescribe—

The COURT: You may save your point.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Mr. PARKIN:

Q. I will ask you whether or not in the experience you have had in the last nineteen years, you became familiar with the word- "wine gallon"?

A. Yes.

Mr. ZOLINE: That is objected to for the same reason as before.

The COURT: He may answer.

110 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. PARKIN:

Q. Do you find it?

A. Yes; it is Section 3339A.

Mr. PARKIN: I offer that in evidence.

Mr. ZOLINE: Same objection, if the court please.

The COURT: Objection overruled.

To which ruling of the court the defendant by his counsel then and there duly excepted.

Mr. PARKIN (reading Section 3339A): Sec. 21, Act of March 1, 1879, 20 Stat. at large, p. 327.

111 Mr. PARKIN:

Q. When is liquor below proof?

Mr. ZOLINE: That is objected to.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. When the hydrometer stamp and the hydrometer cup show the reading below 100 degrees.

Mr. O'DONNELL: Objecte- to. Move to strike out the mechanical appliance.

The COURT: Strike it out.

The WITNESS: Under 100 per cent proof.

The method of paying taxes upon distilled spirits is: \$1.10 on each proof gallon of distilled spirits at that rate. If the proof is higher the tax increases proportionately. Illustrative of that you spoke of 150 proof to the jury; the tax on that, at the rate of \$1.10, would be \$1.65. That is, \$1.65 is made up of \$1.10 for the 100 proof plus 50 per cent.

Mr. PARKIN:

Q. How does the distiller or producer of spirits pay his taxes—explain the office routine of that?

Mr. ZOLINE: That is objected to for the reason that we are not charged with being distillers.

The COURT: It seems to me that count No. 4 says that the defendant here did something with the distillery—that he concealed liquor which had been unlawfully removed from the distillery. He may answer.

112 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. A United States Revenue gauger examines the contents of a package, weighing the package upon a platform scale, or beam scale,

to determine the gross weight, deducting therefrom the *tear* on the package, as determined at the time that the package was emptied, and adding thereto the soakage allowed by regulation and the law, thereby obtaining the net weight of the contents of the package. He then determines the proof, the strength of the goods, the alcohol proof of it, to obtain the proof gallon contents. If the proof is below 100 he treats it as if it were 100 or as wine gallons and assesses or extends the taxes at the rate of \$1.10.

If it shows that the proof is 101, 2, 3, 4 or 105, or any other period above 100, the tax increases proportionately, upon the amount of taxes determined by him. The distiller then makes application to the collector, presenting a check covering the amount of that tax, and asks practically that a stamp or receipt for the money
113 be issued to him, known as a tax stamp for distilled spirits.

Mr. ZOLINE: I move that the answer be stricken out.

The COURT: Overruled.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

The WITNESS (continuing): The distiller receiving that stamp returns to the distillery and turns it over — the *the* United States storekeeper, who has charge of the warehouse. That stamp is then signed by him and turned over to the gauger for signature. The gauger takes the stamp, affixes the stamp to the package by tacks and attaching it with paste and varnish, also driving through the stamp into the wood eight tacks; he cancels the stamp with five parallel waved lines, stencilling his name and district and office on the head of the stamp, and below the stamp marks the same number as in the head of the package, and then delivers that package to the storekeeper in charge of the warehouse who, in turn, releases it from the warehouse and turns it over to the distiller.

Mr. PARKIN:

Q. What do you mean by "package"?

A. A barrel, half a barrel or ten gallon keg; nothing smaller.

114 Q. How many tacks are required to be placed in the stamp on the barrel?—tax paid stamp?

Mr. ZOLINE: That is objected to as giving his version of the law.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. Eight tacks.

Whereupon the further hearing of this cause was adjourned until Friday, October 11, A. D., 1912, at 10 o'clock a. m.

115 W. P. SMITH resumed the stand, and further testified as follows:

Direct examination (cont'd).

By Mr. PARKIN:

The WITNESS: When a barrel of distilled spirits is delivered from a distillery to a rectifier, or wholesale or retail liquor dealer, upon the stamp-head is the serial number of the package, following that serial number of the warehouse stamp, date of original inspection, the entry of the warehouse and small warehouse stamp is upon the barrel.

That section of the Revised Statutes covering the marks, brands and stamps upon barrels at the time of their delivery from the distillery warehouse, don't cover all the marks and brands. They are practically all put there under the statutes.

Section 3287 applies to drawing off, gauging, marking the casks and removal to warehouse.

(The District Attorney read Section 3287 as follows:)

116 The WITNESS: Then you asked me as to the marks on withdrawal; that is section, 3295.

(The District Attorney read said section.)

Mr. PARKIN: Now aside from the statutes are there any additional requirements respecting the marking, branding and stamping of the casks and packages?

Mr. ZOLINE: Objected to unless it is a regulation of the Internal Revenue Department.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. Yes. Those regulations are the "Gauger's Manual"; they are regulations by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury I have those regulations which were in effect during 1908 and 1910.

The COURT: Is not the Commissioner of Internal Revenue authorized by Congress to make these regulations?

Mr. O'DONNELL: Yes, your honor.

Mr. PARKIN: If the court please, I will offer in evidence and read from the Gauger's Manual, 1906, United States Internal Revenue, page 131 as follows (reading):

117 The COURT: "The portion to be cut out" explain what that means?

A. On distilled spirits there are two grades of stamps, one known as the "warehouse stamp," which is a single piece of paper, and the other the "tax paid stamp," which has a false back; the middle of the stamp is not attached to the false back, but fastened to either side, that is, the full face of the paper is one piece of paper, but on the back is a blue piece of paper painted over the material part of the stamp, containing the number of the distillery, serial number of the

stamp, the proof of the contents, collector's name, and so on; and when that stamped package is taken into the liquor dealer's house, transferred into his rectifying account, and he wishes to empty the contents, through the intervention of the United States gauger that portion of the stamp is cut down with a knife on one edge, and the surface of it pulled off, giving the full data practically of that package; the gauger taking possession of that stamp, affixing it to the Government paper, returns it to the collector, who returns it—forwards it to the commissioner at Washington. That is what is meant by a "cut out" of the stamp.

118 There is a regulation respecting the number which is branded upon the barrel corresponding with the number on the stamp. This is at the distillery (reading regulation from book).

These regulations (indicating book) are based on Section 3318 of the Revised Statutes.

The District Attorney read said Section 3318 of the Revised Statutes to the jury.

119 The WITNESS: This book is known as Regulations No. 7. They were effective during the years 1908, 1909 and 1910.

The document, Government Exhibit 8, is known as Form 52A. This is a copy or transcript from form 52A and 52B, mentioned in that regulation.

Under the regulations of the Commissioner of Internal Revenue, the wholesale liquor dealer is required to keep the transcript book, which you have just read the law on. That is known as 52A and 52B. 52A is a record of goods received into the house with the accompanying data, and 52B—the disposition of the same goods. The document which you have here is a transcript from them. I will explain to you how this transcript is made. This is really the original paper; the book is in bound form and contains tissue sheets, a tissue sheet, and then a heavy sheet; the tissue sheets are arranged so as to be torn out of the book, the heavy sheets to remain therein.

The wholesale liquor dealer when he makes those entries in these books, inserts a carbon sheet; he writes on this surface and it carries through on to the heavy sheet. At the end of the month he tears out these transcripts, the original entries, signs them, swears to them, and returns them to the collector, as required by law.

120 That is how these happen to be in the possession of the collector. These two sheets here are 52A and 52B. 52A is the one upon which he notes the liquor he gets from other persons; this he receives in the same packages; From 52B he makes the invoice of the liquor which he disposes of. The following instructions must be observed: Under "Date when received" he must give the year, date and month on which the spirits are received; under "From whom received" enter the name of the distiller, rectifier or other person from whom the spirits are received. In no case will the name of an intermediate party, such as a common carrier or agent who simply negotiates the sale, be given in this column (reading instructions applying to 52A and 52B).

Section 3317A of the Revised Statutes refers to gaugers and rectifiers before rectifying and dumping.

Mr. PARKIN: I will read that, if your Honor please.

The District Attorney read Section 3317 of the U. S. Revised Statutes.

121 "Dumping a package"—to empty out the package would be dumping; but there is a method in which it is to be done. Suppose for instance in this case the defendant had received a package of 50 gallons, contained in a barrel from the Illinois Fruit Distilling Co., and he desired to dump, the word "dump" would mean it would be necessary for him to file that notice with the collector; the *gager* makes the inspection of it first. The word "dumping" does not necessarily mean emptying the cask; we have what is called dumping and also constructive dumping—we turn the package over and they can compound in the package without emptying the contents out. One way of dumping is to empty the cask into the mixing tubs. Prior to dumping it is necessary to follow the section just read.

Mr. PARKIN:

Q. Are you acquainted or were you acquainted with in the years 1908, '9 and '10 one Simon Frindel?

Mr. ZOLINE: That is objected to.

Mr. PARKIN:

Q. Where does Mr. Frindel reside at the present time?

Mr. ZOLINE: That is objected to.

The COURT: Objection sustained until the District Attorney advises the court what the purpose of this is. Are you going to prove by this that this man Frindel was a partner of the defendant

122 here?

Mr. PARKIN: Yes, a partner in crime.

The COURT: That is immaterial.

Mr. ZOLINE: I take an exception to counsel's remark "partner in crime."

The COURT: Yes, and the jury are so instructed.

Mr. PARKIN:

Q. How long is it since you have seen Mr. Frindel?

Mr. ZOLINE: That is objected to because Frindel has been ruled out for the present.

The COURT: He may answer that question, it is harmless.

To which ruling of the court the defendant by his counsel then and there duly excepted.

A. Not since the day of his sentence in Judge Landis's court.

Mr. ZOLINE: Now, if the court please, I take an exception.

The COURT: Strike it out of the record.

The WITNESS: I first met Mr. Frindel about September or October, 1909, at the Illinois Fruit Distillery at 2807 Quinn St.,

Chicago, Illinois. The distillery building was a two-story affair, about 50 or 75 feet wide by about 200 feet deep.

123 This picture (indicating picture handed witness by counsel) is a representation of the distillery building, the place of deposit for brandy, and the retail establishment. (Witness points out to the jury different places on said picture.) This is the building proper. This building (indicating) is connected on the rear of the main distillery building; this is the warehouse; this is the place of deposit of brandy not tax paid. This building (indicating) was partially used above for a sleeping apartment for his men; below is the retail establishment for the sale of distilled spirits. This is a tight board fence surrounding the distilling premises, with a large door barred on the inside, kept in that condition, simply opened for wagons to pass through; another smaller door here was kept locked with a bell attached.

(Said picture is handed to the jurors.)

Mr. PARKIN: If the court please, I will offer that as Government Exhibit 28.

Mr. ZOLINE: I object to it on the ground that there has not been shown any connection.

The COURT: Objection overruled. I think it is pretty well in; the jury have seen it.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

124 Said exhibit was admitted in evidence and marked Government Exhibit 28.

The WITNESS: I have visited the interior of this establishment. I can't recall the exact date; some time in the month of January, February and March, 1910, as near as I can get it. I first commenced visiting there in the fall of 1909, and the distillery was closed in April, 1910. At that time the distillery was in operation and the manufacture of brandy was going on. The products used, as far as I knew at that time, were raisins—dried grapes. At that time I saw the fermenting tubs (marked on the photograph "fermenting tubs upstairs"), at the Illinois Distillery; they were in the main distillery building, on the second floor, in the building with the smoke stack (indicating on photograph).

Mr. PARKIN: I offer that in evidence as Government Exhibit 29.

Said photograph was admitted in evidence and marked Government Exhibit 29.

Mr. ZOLINE: That is subject of course to our other objection.

125 The WITNESS: Upon the occasion of my visits, I saw Simon Frindel, Frank Weiss, and at another time Abraham Weiss, and possibly some other employes, whose names I did not know or cannot recall. This distillery was registered as a fruit brandy distillery. There is a difference between a fruit and grain distillery.

A fruit distillery, under the law, is permitted to use fruit only for the manufacture of distilled spirits or brandy. All fruit received upon the distillery premises is under the control of the distiller and

not any Government officer; that is, a government officer is not assigned to a fruit brandy distillery the same as they are at a grain distillery. I discovered here apples, peaches, prunes, grapes. There is no restriction as to the kind of fruit, only as to the name—what kind of fruits they intend to use on the statement of their different fruits; a survey is made, and they are required to make so much brandy from the amount of fruit in that class; different fruits and things of that kind would have a different survey. These fruits can be either fresh or dried. The material received upon the premises by the distiller is entered upon the Government record, which is required to be kept, known as Form 25½. He also enters

126 thereon the quantity of fruit used by him, the number of hours that his distillery is in operation or the boiling continues—boiling the mash and the quantity. A distillery of this kind is allowed to run every day of the week except Sundays. It is closed Saturday night until 12 o'clock, and not opened until Monday at 12, that is, Sunday midnight; it stops operations between midnight Saturday night and midnight Sunday night—at all distilleries.

The distiller also keeps a record of all brandy produced by him; he is required to notify the collector when his brandy is produced, at least once a month, and ask for the Government gauger to visit the plant and gauge up the brandy that he has produced. The *gauger* does that and distiller then places those packages in his warehouse, commonly called a place of deposit, as distinct from a grain warehouse. In the case of this distillery that was the small building at the end of the larger building. When the brandy is gauged by the gauger it goes into that building, and is under the sole control of the distiller until he wishes to tax pay it, which he must do within sixty days. He makes application to the collector to pay the tax, receives a stamp, and affixes the stamp to the package

127 himself, under the regulations which have been set forth today. Then he is permitted to withdraw it and place it on the market, and upon his record, 25½, he enters to whom he delivers those packages.

It was not permissible during the operation of this distillery to use sugar in the manufacture of brandy.

I am acquainted with the defendant, David Shapiro. I first met him some fifteen or sixteen years ago, maybe seventeen. In the years 1908, 1909 and 1910 he was engaged in the wholesale and retail liquor business, also as a rectifier *also* of spirits. His place of business was at 1410 I think south Halsted street; old number 617 I believe.

I made this diagram of the place of business at 1406 to 1410 South Halsted street, from an actual inspection of the premises (indicating diagram). It is practically a correct representation of those premises during the years 1908, '9 and '10. I am not a skilled draughtsman; but it represents a relative view of the interior of these premises. It was not drawn to scale, but by the eye. I don't claim it is anything except an approximation or general illustration of the premises; simply done to locate the tanks.

128 I did not intend to show all the windows; I had the different doors—connecting doors in the different rooms, and as near as I could the exits and entrances inside and out of the building. I do not show all the objects in the place, or a lot of goods and so forth. I only claim it is correct as far as it purports to show. When I made that it was practically correct as to the location of those rooms.

MR. PARKIN: Well, I offer that in evidence.

MR. ZOLINE: I object on the ground that the witness states that is not a correct representation; it is only a sort of rough view, and he can describe it without offering it in evidence.

THE COURT: It may go in for what it is worth.

Said diagram was admitted in evidence and is marked Government Exhibit 30.

The WITNESS (standing up and pointing out on the diagram to the jury): No. 1406 South Halsted street is the main entrance to the establishment; on the right are the office apartments; this room is the retail establishment proper. On the right is the office
129 apartments; immediately in the rear of that on the right is the retail counter; a number of barrels in the rear of that. On the other side are counter and shelving with bottles of goods. In the rear are barrels of goods stored in practically this room with a connecting door there; that is another connecting door through a partition; I don't know whether it went to the ceiling or not—into what is known as the shipping room, with a door leading into the public alley in the rear for the shipment of goods or receiving of goods. Through this archway you enter into another room, known as the compounding room, where the rectifying and mixing was done, the gaugers made their inspections and stamped the goods. These several tanks, four of them in number, were goods presumably ready for sale, to be drawn into bottles, they being large tubs stamped with wholesale liquor dealers' stamps. In the corner was a filter for filtering whiskey, clarifying it.

On the right, in this corner immediately to the right, on entering the rooms were a number of rectifying tubs where spirits were dumped after the gauger had inspected them, to be placed there for rectification or compounded immediately. There was a pump used
for pumping the goods out of the barrels into these tubs.

130 A connecting door there entered into a bottling room where the goods were bottled.

In the second room in the rear the bottles were labeled; the labels placed on tables.

In either of these two smaller rooms here connecting were store-cases of brandy, bottled brandy encased.

The front of this building is located on the west side of Halsted street.

The dumping vats are immediately to the right of the door connecting these two main rooms. The compounding was done in these tubs and drawn off into barrels and mixed in barrels.

The defendant had a storage place across the street in the basement. I first learned that I think on February 15, 1910. Mr.

Chandler went over with me when I visited the establishment of Mr. Shapiro; and I asked him if he had any goods stored across the street in a basement. He said he did have, and upon being advised that we wished to visit and see what was there, he consented to our doing so; and I don't recall whether his brother, Ben, I think it was, who went across the street and opened up the place for us.

We found there quite a large number of cases of bot-
 131 brandy; it was presumably what they call Kosher brandy, or brandy to be used for their Easter holidays. I did not open the bottles. There were approximately 2921 64/100 gallons in that cellar. In the main place of business—I have it all figured up here together at the two places—I found a total of 5401 and 48/100 gallons of brandy. Some of the brandy was in bottles, some in jugs, some in barrels, and some in wholesale liquor dealer's stamped packages. Assisted by Mr. Chandler, I took an inventory of the stock of brandy in the two premises. We detained four packages of goods there, four barrels that were in an illegal condition, and had them seized subsequently by the collector. There were no brands, marks or stamps upon the barrels to show they had ever been tax paid. They were what were called 40-gallon barrels, running from 40 to 50 gallons; I don't recollect the exact size; they were plain packages. We detained them and reported to Col. Ingraham, revenue agent, and the collector subsequently seized them, and I understand they have been since stored in Sibley's Warehouse. They are still in the possession of the Government. I think the defendant was present at that time; he was there part of the time when we first went
 in.

132 I next saw the defendant on February 18, first in the Revenue office downstairs, at which time I told him Mr. Chandler and I desired to visit his establishment to examine his ledger accounts with the Illinois Fruit Distillery and also to examine his checks and check books and cancelled checks. He accompanied us to his place of business, and we there made the examination requested.

The checks you hand me were turned over for our investigation by Mr. Shapiro to us, he taking them from his private desk, a small desk with drawers there. He made no statement or explanation respecting them at all at that time; we went through the checks to try to determine who he had issued the checks to in connection with the Illinois Fruit Distillery, and to find out how much he had paid for brandy received from there.

After we had gone through the checks and taken out such checks as we thought were material to us, we left the others in his possession. He requested Mr. Chandler to call off the several amounts of these checks that we had taken possession of, he adding the amounts up on an adding machine such as you see in Chinese laundries—the little button propositions, and which I understand are used
 133 in Russia a good deal; and after calling off the checks—some fifty odd in number—to him, he said that the total was something over ten thousand dollars.

He did not state that he had paid those all to the Illinois Fruit

Distillery; they are made payable to different parties. To the best of my recollection, he stated that part of them were in payment for fruit brandy received from the distillery, and again that at times they would come into him with a small amount of cash or checks, and wishing to forward the money to Baltimore, they would turn the money over to him, and he in turn would give his individual check for that, so they could forward his check to Baltimore for deposit.

He stated that he had purchased a considerable quantity of wine from the Illinois Fruit Distilling Co., and that these checks were in part payment.

I never saw any wine at the distillery only in barrels at the retail establishment. That was practically all the conversation that was material; we were there three or four hours, and of course considerable conversation took place.

I visited the defendant's place of business again, in company with Mr. Beach of our office, on April 15, 1910. I then
134 had a conversation with Mr. Shapiro relative to his receiving this brandy from the Illinois Fruit Distillery. The distillery at that time hadn't been seized and the principals arrested.

Mr. O'DONNELL: I object and move that be stricken out.

The COURT: Strike it out.

The WITNESS: During our conversation I tried to persuade Mr. Shapiro to tell the facts in regard to his purchases of brandy from the Illinois Fruit Distillery, as to what quantity he had gotten from them, prices paid and so forth. He said that when goods came to him in stamped packages, irrespective of his knowledge of what the Revenue tax was, if he could buy them for less than the Revenue tax, he would do it every time. He further stated, after my requesting him to give me further information as to prices and so on paid by him to the Illinois Fruit Co., that he would rather cut off his right hand than become an informer.

I tried to get him to tell me how much brandy he received from them, in what condition he received it, and what he paid for it; and his reply was as just stated.

135 I told him that a party might come in occasionally and offer him goods at less than the price per gallon of the tax per gallon; that the transaction might possibly be all right; but when parties came to him week after week and day after day and offered him goods for a price less than the Government tax per proof gallon that he knew well that it would be illicit goods. He said he knew that to be true. Then I told him that under those conditions he would be as big a crook as the man who was selling it. To that he practically had nothing to say. He broke down and cried, and complained of his side hurting him; he had recently passed through an operation at the hospital, and became very nervous. His statement about cutting off his right arm was practically at one and the same time with reference to that situation.

I have prepared a compilation of exhibits 8 to 27 inclusive. The compilation shows with respect to the amount of liquor purchased by the defendant from the Illinois Fruit Distillery during the period

covered by those reports that from September 23, 1908, to March 1, 1910, the total is 3362.09 gallons, proof gallons. That is all of the product reported by the defendant as having been purchased from the Illinois Fruit Distillery.

136 These records are the only records which require that data to be entered upon, the only records that were returned to us by the defendant covering that period of time. There is a smaller record of all goods received; of course this includes whiskeys, brandies, all kinds of goods, in addition to that end of the manufacture—Form 338, which is descriptive of the different kinds of goods received and disposed of by him in bulk—a sort of recapitulation sheet.

At the time of the conversation there were present at Mr. Shapiro's place of business his son, Jake, I think most of the time, if not all the time—special employé W. G. Beach and myself. Mr. Beach and the defendant walked away from me, and eventually the two were together; that was after Mr. Shapiro had broken down and complained of his side hurting him, and being nervous, or *has* wound hurting him. That was after the conversation about cutting off of his hand.

Mr. PARKIN: I offer in evidence these checks bearing dates prior to the finding of the indictment, the checks identified by the witness as having been given to him by the defendant.

Mr. ZOLINE: We make an objection to their introduction on the ground that these checks do not shed any light whatever upon 137 the issues in this case as to any count in the indictment. The only objection is that they are wholly immaterial, there is no objection as to the signature.

The COURT: Well I can't see the materiality at this time; but I assume that the Government has prepared its case link by link, and if their relevancy and materiality is not shown they will all be stricken out. They may go in.

Before you read them I would like to look them over.

To which ruling of the court the defendant by his counsel then and there duly excepted.

Cross-examination.

By Mr. O'DONNELL:

50 checks admitted in evidence and marked Government's Exhibits 31 to 79 inclusive. Same being for various amounts and amounts and totaling the sum of \$9,424.70.

My official capacity with the Government is United States Gauger, assigned to special duty. I have been in the First District of Illinois in that capacity on several different occasions; at the present time since October 1, 1908. I have been on duty here ever since with the exception of nine months in the hospital, commencing the 1st of December, 1908 until the first of August, 1909.

With others, I had general supervision over this district. Col. Ingram was my superior officer.

I can't recall whether I became acquainted with Simon Frindel

in the late fall of 1909 or the spring of 1910, when I went out there.

138 I never met Max Bronstein at the distillery or anywhere else until after the seizure of the distillery; I didn't know him at all.

I was down in the basement to see the brandy in David Shapiro's place February 15, 1910. There went with me I think Mr. Beach and Mr. Chandler, Anderson and myself—four of us visited the establishment of Mr. Shapiro. Mr. Beach went over across the street with me; to my best recollection Ben Shapiro let us in; he is a brother of the defendant I think; I am not positive of that. In that basement I found bottles of what purported to be brandy. I took no samples of it. The amount of brandy there as estimated by me was 2,921 64.01 gallons; a little less than 3,000 gallons. I can't say in what sized bottles—what are termed 10's to the gallon. You could not call them pints. They may have been 5ths; also they may have been both. It was in cases; the cases were all marked; I can't say if the bottles were labelled; I didn't look to see if they were labelled that I can recall. I can't say whether there was a paper writing on the bottles; I don't recall opening any cases. The boxes were marked as containing, if I am correct about it, but marked on the outside as containing Kosher brandy or Easter brandy. Ben Shapiro was with me, and together

139 we estimated the contents of these cases as so much brandy.

As far as opening up cases are concerned, I don't know whether there was a single case of brandy in the whole thing. I took their word for it. Mr. Shapiro afterwards made application to the collector's office to dump the brandy in those bottles for the purpose of clarifying. From my own knowledge I did not open any case or pull any cork.

The word "Kosher" according to my understanding means "clean," not necessarily pure, but "clean," in the Hebrew language. It is a different process of distillation all through. It has nothing to do with the strength of the brandy. It has to do with the way in which it is handled all the way through; it is the brandy that the orthodox Hebrews use during their festival of easter season. It is accumulated by the big Hebrew dealers six months in advance of Kosher time, in March or April—it varies. I don't know how long the merchants take to accumulate their Kosher stock; I presume they would begin to accumulate it in advance quite a while to meet the demands of their trade and make quick shipments.

That kosher brandy is some times sold in jugs and in barrels; it is sold in 10ths the greater quantity of it.

140 When I returned from that basement and went over to his store I possibly looked over his 52—those would be the books, if any (indicating).

I can't say whether the kosher brandy is a fruit brandy generally, of my own knowledge.

I found a place for labelling it in the defendant's place of business and found labels there; they were affixing labels to the bottles; I can't recall the wording of the labels; but labels were placed on in his place of business on bottles.

Q. He had a right, had he not, if he had bought *taxed* paid property, taxed brandy, he had a right to put labels upon it and sell it, hadn't he?

A. Draw it into bottles from the stamped packages——

Q. If the tax was paid on it, he had a right to do that hadn't he?

A. To draw it from the stamped packages into bottles, cork it and label it and place it upon the market.

Q. And label it with his own label?

A. Sure.

Q. And store it pending the time of sale?

A. Undoubtedly.

Q. He also had a right to store it across the street and
141 hold it there?

A. Yes.

The WITNESS: At the time we found those cases it was February 15, 1910. I do not know what time their Easter season was on that year.

I do not know if there is a wholesaler of California brandies and California wines located in New York City by the name of E. L. Spellman & Co. I have not been in New York for about 20 years and I don't recollect the list of dealers there. He would not enter in his book under the name of "kosher brandy"; he would enter it simply as "brandy." The books would tell from whom he bought it. If he bought from Spellman & Co. the books should probably tell, if he received it in stamped packages.

As to Barton Muscat—the Sierra Park Distillery Co., I believe there is such a distillery by that name in California. I can't say whereabouts it is without reference to the records. I have seen packages branded in that name, California brandy. I do not positively know where the Barton Muscat brandy is distilled; I do not know if there is such a place; I could not say that I recall the Kirby Muscat distillery. I know the Barton Greenwich Co.

Q. These are the identical books that were over there at the time, were they not (indicating)?

142 A. Well, the book proper is there; these are transcripts filed. They were not there at the time of my visit; they were removed from the place month by month. It was not necessarily my business in that line to examine his books over there and examine the records here. When I went down there and found that 3,000 gallons of brandy in the basement across the street, I don't presume I did make an investigation either of the books there that day or on the transcript of his books to see where it came from.

Q. Will you tell this jury if there was one gallon or one pint down there that you saw that was not tax paid?

A. I could not say whether it was tax paid or not. The 3,000 gallons were none of it in stamped packages.

Q. If you found 3,000 gallons of brandy across the street in the basement in 5th- and 10th-, with his stamp on, and if he had drawn that from tax paid packages, and filled them and stamped them, and put them there, he would be within the law, wouldn't he?

A. Labelled them, you mean? Yes.

When I went over there I found a combined wholesale and retail establishment. I did not see him selling any goods at whole-
 143 sale; I saw him selling goods at retail, by bottle and jug.

When I went over to the distillery I found a distillery built and equipped for distilling; and a 10 or 12 foot solid board wall around it; and within the same enclosure was a retail establishment; the connecting door went right into the yard at the time. The distillery was a 2 story concern; and attached to the distillery was a deposit place for storing brandy and manufacturing. In running a distillery—this was registered as a fruit distillery. It had a permit to run as such. The books of a fruit distillery are kept by the distiller himself; it is checked up by a gentleman from the government, on occasional visits. The deputy collector in charge does that work—takes the size of these tubs or vats in which the distillate is made. It does not come to me as a piece of information. In distilling that fruit I know about how long it will take for the tub to turn into brandy; they can run it off in three or four days. The man who buys the fruit keeps a record of what is purchased and used. At that distillery we did not check up his books to judge as to whether or not he was making a correct report; but that is the method; he is required to enter in his books all
 the fruit brought to the distillery for distilling purpose,
 144 and is required to enter in his book all the fruit he uses in actual distillation, and all brandy produced. And the ordinary still, working well, will possibly throw off or distill their tubs twice empty in a week. These tubs were marked 2,000 gallons capacity. There were nine tubs. I can't answer how much brandy it would distil; it depends on the condition of the fruit. I never operated a still. My knowledge to a very large extent is the knowledge of a man working on the outside.

Q. Instead of using fruit at all, if sugar is used, and it is fermented with yeast, it throws off the brandy in about 24 hours, don't it?

A. Yes, it would be that.

Q. So that the man who runs a still, instead of discharging his tubs twice a week, could discharge them about six times a week by using sugar to ferment it?

A. Well I want to modify that last answer; in grain distilleries where they do use yeast, the fermentation is about 72 hours, under the regulations. But yeast will ferment in sugar mash in a quicker period if that is what you want to know. We permit the use of sugar in what is termed rum distilleries, but not in fruit distilleries.

145 It is a class by itself. I do not know how much brandy a vat of this size would make if sugar was used. It is my understanding that when sugar is substituted for fruit that it is a much quicker process; I do not know how much quicker; I don't know whether it is more or less expensive. I have no way of judging, if sugar is substituted for fruit, how much would be gotten off in a week; I would have to find out how much sugar is used. That is one way of committing fraud on the Government, substituting sugar when they are pretending to use fruit, and getting off a great

deal more brandy than you expect them to get off with fruit; in other words, using material for the production of spirits that they don't report to the Government and place on the books.

These people had a license for retailing; I believe the retail license was in the name of Simon Frindel individually; I can't state positively that. It was a part of the works, controlled by the same set of people.

Q. A retail dealer, if he draws his goods out of tax paid packages—a retail dealer can sell in jugs, can't he, of three or four gallons without a stamp on the jug at all?

A. Yes, in quantities less than five gallons.

146 Q. So that in selling quantities in jugs generally, the question comes back as to whether or not it was drawn out of a tax paid package or not?

A. Yes.

Q. There would be no fraud in selling if it was out of a tax paid package, and it would be a fraud if it was not?

A. No package of a less capacity than five gallons has to be stamped.

In reference to the strength of liquors, alcohol is practically as strong as any that they put on the market; they also put spirits on at same proof, 190. Spirits is made from corn. The alcohol will run up to 190. 190 is the standard of United States Pharmacopeia and they can reduce it and put it on the market any proof they wish. Alcohol carries the tax paid stamp just the same as brandy. That is, all those brandies and spirits and alcohols are taxed according to the alcoholic strength, and the same stamp. There is only one tax paid stamp.

When we dump out, that is, goods placed in the hands of the rectifier—grant him the privilege of mixing it. The rectifier has the privilege to take those goods and mix them in any way,

147 manner, shape or form that he sees fit. Taking what we call grain spirits, he can reduce that say from 100 proof, as he receives it, down to any proof he wishes, 90 or 80 or 70, by the addition of water. Then he will, if he is making a dark whiskey, he would use burned sugar, or brown juice to establish a color, the spirits and water both being white or colorless, he has to add sugar for coloring. He will add a little whiskey for flavoring purposes, or may use essential oil for flavoring purposes; and from these he will manufacture all the liquors known to the trade—rye whiskey, bourbon whiskey, sour mash or white rye whiskey; he can manufacture gin, kimmel, blackberry brandy—anything that is called for in the trade.

A man who is a rectifier, when he gets the packages upon which the tax is paid, he makes application to the collector for a gauger; the gauger goes there and dumps it and places it in his possession for mixing. Ordinarily alcohol, 180, is nearly twice as strong as the ordinary brandy. He can dump that and mix it or blend it with weaker stuffs and fill two barrels out of it.

Q. At 90 apiece, can't he?

148 A. He can increase his wine gallon contents, but not his proof gallon contents. And with those two barrels of 90 each, he has made both of them out of the brandy at 180—out of the alcohol.

The stamp that was on the alcohol is taken away by the gauger dumping the goods; that is the cut-out part of it. It could not be used again.

MR. O'DONNELL:

Q. Now if he fills his two barrels up, he can go to the Government, free of charge, and get two stamps, one for each barrel in exchange for the stamp destroyed?

A. The gauger goes there and affixes them to the barrels. Yes, two stamps, but only after the gauger has inspected. The honest dealer that has these goods in two barrels is entitled to two stamps for the one stamp he had on the alcohol. The stamp that he can get from the Government is named a Rectifier's stamp. That stamp has a false back. If he wants to send those out to his trade as a rectifier's stamp, and wants to send it out as a wholesaler's stamp, he can tear off that false back, and bring it down to the Government, and the Government will issue to him two wholesale stamps for the two rectifiers' stamps; the rectifier's stamp is affixed by the Government, the wholesaler's stamp is not; he goes down and gets it and carries it away.

149 When the rectifier's stamp is put on, it is lawful for the spirits to be drawn out into jugs and sold, if it is sold from a retail establishment, provided he enters them on this book first as charged off to retail.

There was a company, called the American Fruit Distilling Co., I believe a rectifying house, on Blue Island avenue, for the first two or three months that the Illinois Fruit Distilling Co. operated, and then it ceased to exist; I can't tell you who ran that, as I was sick in the hospital at that time.

Q. So we had part of this time *we had* a rectifying house, a retail house and a distillery?

A. I cannot say anything as to the rectifying house; that was never operated in Frindel's name to my knowledge; I don't know of any connection between the two personally.

They rectify kosher brandy; that is, they mix up goods and brand it kosher brandy, when, from the true Jewish standpoint, it is not kosher; it is made out of other spirits, and simply has a brandy flavor; a great deal of that is in the market improperly branded, from a Jewish standpoint.

I do not know if a man named Jake Seltzer was connected
150 with the American Fruit Distilling Co.; I never came in personal contact with such a party. That house came into existence and went out of existence while I was in the hospital. I understand they closed it up as they did not consider it good enough to follow their distillery business.

When I went over there that time Mr. David Shapiro was allowed to dump; he had qualified as a rectifier; he rectified part of the time.

I checked up the amount of stock when I went over there, as to brandy, assisted by Mr. Chandler—to see if he had any stamped packages. We simply wanted to find out how much brandy he had which we thought might be illicit brandy. We found four barrels. I cannot say whether we found him long in stock or short in stock; we did not make any comparison; we made no attempt to make it by evaporation.

Whereupon the further hearing of this cause was adjourned until 2:15 o'clock p. m.

151 CHICAGO, FRIDAY, October 11, 1912—2:15 p. m.

W. P. SMITH resumed the stand, and further testified as follows:

Cross-examination by Mr. McEWEN:

I received from Mr. Shapiro something over 50 checks I think. I did not count them or keep any record of the number; I am only relying on my memory. He produced to us all the cancelled checks that he had in his possession there in the establishment, so he stated—that he couldn't find any others; we insisted on having all of them; we went through the desk drawers. When we took them we believed that we had all that showed anything that we were looking for at that particular time. Those are the checks that are introduced here. We did not take all the checks that Mr. Shapiro had; we made the selection there; we gave back the rest—possibly two or three hundred checks, mixed checks.

152 Mr. McEWEN: We will offer in evidence these four checks, as part of the examination of the witness, produced from the possession of Mr. Parkin, one April 12, 1909, No. 2394; one of February 2, 1909, No. 1992; one of April 9, 1909, 2397; and one of November 23, 1908, with no number, for \$40, all signed "D. Shapiro," and all three of them to the order of Max Bronstein, and one to the order of F. Weiss, all on the West Side Trust & Savings Bank, and bearing endorsements that show for themselves.

Said checks are admitted in evidence and marked Defendant's Exhibits 1, 2, 3 and 4 for identification.

Redirect examination by Mr. PARKIN:

The WITNESS: To reduce or increase the quantity of a barrel 180 to two barrels 90 proof each, it would be done practically by the addition of water. One barrel of 180 proof is pretty close to alcohol; and that contains a stamp. The distiller, or rectifier, comes to this building and gets a permit to dump; he does not necessarily go to the building; the gauger visits him daily; he would have to bring the paper to the collector's office, and have it signed in the office—notice to the gauger to visit there and dump this package.

153 After he has removed the stamp and put it in his possession, he may add water. The gauger gives in addition to the paid stamp the rectifier's stamp covering the spirits rectified, that he has rectified, after the gauger dumps the barrel; he returns the tax

paid stamp to him; he will then remove half the contents and place in another barrel and add water to each two. Then he will have him remove all the original marks, brands and stamps from the packages, turning it over to the gauger; the gauger would then inspect them and affix to them the stamp for rectified spirits. So that instead of having 50 gallons of 180 proof, he has got 100 gallons of 90 proof. By increasing the wine gallon contents, he does not increase the proof gallon. That is the rule or the law, that the wine gallon may be increased, but not the proof gallon. And it is the proof gallon upon which we place our estimate for taxes and assessments, and not upon the wine gallon, unless the wine gallon is below proof. If it is below 100—if less than 100—then it is treated as 100 for taxation purposes; but 100 is a proof gallon.

The number of barrels that were seized, testified to this morning, I stated there were four barrels; I should have said five barrels, 154 without any marks, brands or stamps; two of them contained alcohol; the other three contained brandy; I don't know whether it was a compounded brandy or a straight brandy. The barrels had nothing at all upon them; they were absolutely without brands, marks and stamps; for that reason we seized them, because they could not be identified as having been tax paid.

W. G. BEACH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. FREEMAN:

The WITNESS: My name is W. G. Beach; I am a special officer in the United States Revenue service; I was appointed in the winter of 1899. In the year 1910 in April I was on duty in Chicago.

I know the defendant, David Shapiro. I visited his place of business in Chicago in the month of April, 1910. I had a conversation with Mr. Shapiro at that time. Mr. Smith was present that 155 day. Mr. Smith and I were in in the rectifying room of Mr. Shapiro's place, and Mr. Smith asked Mr. Shapiro about how many gallons of brandy he had purchased from the Illinois Fruit Distillery and as to the price paid, and Mr. Shapiro didn't want to answer; he had nothing to say about it. Mr. Shapiro said rather than be an informer he would have his right hand cut off. Mr. Smith then said to him, "Well, if you have been buying this brandy at a dollar a gallon, don't you know that you are just as big a crook as the man who steals from the Government and sells it to you"? Mr. Shapiro had been quite ill, and he almost collapsed, and I with the assistance of his son helped put Mr. Shapiro down on a box or a keg; and he had but little more to say after that, and then went out into the retail room—Mr. Shapiro, Mr. Smith and myself.

Mr. Shapiro called to me, and I went out in the rear room, the room in the rear of the retail place with him. He said to me, "I don't like this trouble." He says "What can I do? What would you advise me to do?" He says, "Can I go to the revenue agent, Col. Ingraham, and tell him everything?" I said, "Mr. Shapiro, I

156 don't know; but I will ask the Colonel, and if he says that he will see you, I will come down and tell you so." I never did go back.

Cross-examination by Mr. McEWEN:

The WITNESS: At that time Mr. Shapiro was quite ill, and appeared sick; I think he had a cane, or two canes possibly. I think I understood from him or his son that he had just undergone a very serious operation of some kind; Mr. Smith and I were there possibly an hour and a half. Mr. Shapiro was not standing up all the time; he was standing possibly five or ten minutes and almost collapsed. When we had assisted him to his resting place he stayed there until we went out in the retail part of the place. I did not meet him after that.

MAX S. BRONSTEIN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. PARKIN:

The WITNESS: My name is Max S. Bronstein; I reside at Baltimore, Md.; I am working for my father in the rags business. Prior to that my family did not reside in Chicago, but I was in Chicago, from about July, 1908, until about February or March, 1910. When I came to Chicago I came with Mr. Frindel, Proprietor of the Ill. Fruit Distilling Co., July, 1908. I met the defendant David Shapiro; at 1406—I think it was some other number at that time, they changed the numbers in that vicinity; it was on South Halsted street, at his place of business. There was present at that time David Shapiro, Mr. Frindel and myself; it was on Friday; we had a conversation at that time. The conversation of Mr. Frindel to Mr. Shapiro was that he expected to remove his distilling apparatus to Chicago to operate a fruit distillery in this city; his distillery at that time was in Baltimore; Mr. Simon Frindel had leased that distillery; he leased the apparatus from me; that apparatus was mine. Mr. Frindel was shipping at that time some brandy from the east. Mr. Frindel asked Shapiro about how much goods he could use per week, and he said he could use several hundred gallons after the distillery might be here. Mr. Frindel asked him at that time to give him a check for the brandy he shipped him from the east; and he gave him a check for the money, and he dis-
158 counted at that time for two stamps for packages that were shipped from the east \$10 on the bill. Mr. Shapiro said it wasn't enough, to take \$5 for tax paid stamp where it cost about \$50; but that is all that Mr. Frindel allowed. There were stamps there; I saw them; they were tax paid stamps from the Hudson Distillery in New York.

Q. How did they look?

Mr. O'DONNELL: I object to that as not being included in the charges and the indictment.

The COURT: —.

To which ruling of the court the defendant by his counsel then and there duly excepted.

The WITNESS: The condition of the stamps were: They were original stamps that were put on packages, but the tacks were taken out, and they simply contained little holes where the *stcks* were supposed to be. Mr. Shapiro had the stamps; he had them in his pocket at the moment when I was there. Mr. Frindel said he would allow him on good when he gets—when he will get here with the distillery. The two stamps he had there Mr. Frindel said he would put back on the barrels when he went back east.

159 Mr. FREEMAN:

Q. Did he give Mr. Shapiro anything for the two stamps?

Mr. O'DONNELL: Objected to; it has been gone over.

The COURT: He may answer.

To which ruling of the court, the defendant by his counsel, then and there duly excepted.

A. He allowed him \$10 off for the two stamps.

When we left the store the stamps were in Frindel's possession. Mr. Shapiro said it was not enough to allow him \$5 for a stamp; and Mr. Frindel said that when he would get here with the distillery and he would commence to sell him goods, he would allow him for that little difference that there was between them. There was no more conversation that Friday evening. That is all I remember now. This was around six or half past six in the evening, the time to close up the place of business. Mr. Frindel left for St. Paul and I stayed over in Chicago until Saturday night.

The next time I talked to Shapiro was when I came on again with apparatus in August of the same year, 1908. The apparatus consisted of a boiler, and engine, and still, a column, a colander, a condenser and several vats and other utensils that are necessary

160 to manufacture this brandy. That is a photograph of the vat (indicating Government Exhibit 29). The first time that the distillery operated here, there were seven vats; and the second period of time they had nine vats. I came by passenger train and the apparatus came by freight car; I came a day or two ahead I believe of that apparatus. I came with Mr. Weiss; he was the mechanic of the place, Frank Weiss. When I got to Chicago I took along Mr. Frank Weiss to Mr. Shapiro's store, as I was at Mr. Shapiro's place about a month previous to the time.

After we got here we commenced to put up the plant. We asked Mr. Shapiro to direct us to some hotel here, and he directed us to the Jackson Hotel at Jackson Boulevard and Halsted street. That is all there was at that time of conversation between us, as far as I remember; we had told Mr. Shapiro that the apparatus was coming along and that it would be here in a day or two. I don't remember what he said in response at that time. The place to start the distillery was secured *not secured*; it was looked at by me and Mr.

Frindel the first time we were here, and arrangements were
161 made at fifty dollars a month.

(Last part of answer stricken out.)

The WITNESS: The place secured was at 2807 Quinn street, where the distillery was at.

After Mr. Shapiro had directed us to the hotel, we went there and rented rooms; Shapiro was not with us.

I next saw the defendant Shapiro on September 7th or 8th when the distillery started to be operated. The distillery was ready for business at that time.

The conversation with him at that time as far as I could remember, was regarding the price that Mr. Shapiro will pay for the tax-paid goods and un-tax-paid goods. The conversation was between Mr. Frindel and Mr. Shapiro. Mr. Frindel wanted for the tax-paid goods the price of \$1.80 a gallon of 150 proof. Frindel asked Shapiro the price for the tax-paid goods, which he said was \$1.80 for 150 proof a gallon, and Mr. Shapiro agreed on that price; and for un-taxed-paid goods the arrangements was made at \$1.80 too at that moment for 150 proof. I don't remember anything else that was said at that time. Mr. Shapiro said to Mr. Frindel that he had got to have tax-paid goods in his place of business in order that

162 it shall have the smell of the goods that the distiller produces, as the tax-paid goods he entered on the Government record as an entry that he has purchased from the Illinois Distilling Company for dumping purposes. With one barrel he could rectify a dozen other barrels, and therefore he wanted tax-paid goods at the same price that he bought the untax-paid goods.

The first period of operation the distillery started to operate here around September 8, 1908, and operated until about the last of April, or the beginning of March, which is around the Easter holidays, and then the place was shut down; about seven to eight months the first period. The second period started around about the last of July, 1909, and lasted until I left here, the last of February, 1910. It was still running after I left Chicago about two months. It was seized after I left, after I had been home two months.

In that conversation about the two stamps Mr. Frindel asked Mr. Shapiro regarding the barrels; and he said that the barrels had been sent a day or two ahead of time, that these were sent back east.

163 In the distillery we had a boiler, a still, a charging tub, a column, two plates, condenser, and we had a rectifying tank that we used to rectify the water, so that the water should be clear for putting into the spirits. When we first began to operate we had seven vats; and we had on one side in the yard what is called the retail room, to sell anything less than five gallons from tax-paid barrels.

In making the brandy we used raisins and prunes and raisin seeds, and the most of the material that was used was sugar, bought from the Corn Products Refining Company.

Mr. ZOLINE: I move that that be stricken out.

The COURT: Objection overruled.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

The COURT: They must all be connected up or they will all go out.

The WITNESS: Then when we mashed up the sugar in the tanks—we used to put in fifty or a hundred pounds of yeast in order that it should work up faster, to distil it faster than the period of time the Government generally allows for fermentation to distil the
164 goods; and the goods were taken away to different customers in town, and Mr. Shapiro was one of the purchasers of the goods. To make a vat with sugar and yeast took three to four days. With prunes and raisins it would take from seven to eight days. The yeast makes the fermentation; the sugar don't make any fermentation at all.

During the period I was there there was made in the neighborhood of 70,000 to 80,000 gallons. Of that there was tax paid about 10,000 to 12,000 gallons.

The next time I saw Shapiro was about October, 1908. I started to deliver from the distillery in October, 1908, to David Shapiro. My first delivery was in barrels, from about 47½ to about 52 gallons a barrel would contain. I think I took four barrels on the first delivery of 150 proof; nothing less than 150. I took these first four barrels around the back of the building and rolled them in the store, right through this door (indicating on photograph). When I brought the goods the defendant was generally at 1406, at the door of Halsted street, to see if any officer—the Government officer was coming around to see—

Mr. ZOLINE: That is objected to as a conclusion.

165 The COURT: Strike it out, beginning with the words, "to see."

The WITNESS: He was at the door. He stated that he was supposed to stay there and watch if any officer was coming while the goods is emptied in the other store. When I made deliveries he was at that door most of the times; I wouldn't say all the time.

These first four barrels that were brought there were taken into the rectifying room and pumped out with an electric pump, and after the barrels were emptied, the stamps—the tax-paid stamps, were taken off from the barrels and given to me, and I put them in my pocket; and the empty barrels I put onto the wagon with the heads upside down, and we took them back to the distillery and filled them again. We made the deliveries in a closed-top wagon. I generally delivered the goods to Shapiro on a Saturday night or Sunday morning. The reason that was made by Mr. Shapiro was that there is no Government official working at that time on Saturday nights and Sunday mornings.

Now they pumped out the barrels which I brought with an electric pump. It pumped it from the barrels into tanks, either these five or these three (indicating on diagram).

166 I delivered to the defendant during the first period, the first year, between four and four hundred and fifty gallons, 100 proof stuff, a week, which came in 150 proof.

Mr. ZOLINE: That is objected to.

The COURT: The answer may stand.

To which ruling of the court the defendant by his counsel then and there duly excepted.

The WITNESS: These barrels, when they left the distillery, and arrived at Shapiro's place of business, were marked and stamped, what I would call by the United States gauger, and the stamps were taken out from the United States Government for these barrels, and they were put on the barrels, and reading on the barrels what brand it is supposed to be—prunes, figs or pears, and the gauger's name, and how many gallons is in it, and all of that. They were rolled in as I have described each time; the stamps were always returned to me.

The stamps were put on with candle grease, we just dropped a little on to it so that it should not stick to the barrel. Then Mr. Frindel used to take a nail a little larger than a tack, and make the holes with it where these eight tacks that the Government

167 required—were supposed to be—make eight little holes.

Then when these holes were made the Government stamp was put on and these little tacks put in there so that they should be easy to lift out after the barrel should be empty. After they got to Shapiro's place, sometimes Mr. Shapiro took them off, sometimes his son and sometimes his brother; sometimes I have assisted in taking off some of them. I took them back with me to the distillery.

We made use of them again; and Mr. Shapiro did to a dozen other barrels with the same—done the same thing. After I brought these stamps back to the distillery with the empty packages, they were refilled with the same liquor to add the same strength, 150 or 100 proof, whatever the barrel was, and the stamp was put on again on them and they were rolled in the storage that Mr. Frindel had in there at that time. It never got into the warehouse at all. This liquor which I took to the defendant came right out of the distillery, right out of what we call the condenser or rectifying tank; and the gauger had never seen it, or any other official at all.

When I would deliver this stuff to Mr. Shapiro, I don't remember of having any conversation with him, with the exception of

168 once or twice; it was always done in a hurry. He always called up the distillery after I had left with the empty packages to notify those in the distillery that I had left the place.

(Stricken out.)

The WITNESS: I never answered the phone or talked to him when he called up the distillery.

The \$1.80 price only lasted the month of September; and in October they started to pay \$1.60, and the next month until the finish of the first period they paid \$1.50 for 150 proof.

Mr. PARKIN:

Q. Was the Government tax the same during all that period?

Mr. O'DONNELL: Objected to; it is a matter of law.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. The Government tax is always \$1.10 practically, and \$1.65 for 150 proof.

I hauled the sugar to the factory. I got the sugar from about half past seven—at that time it was already in the distillery from the Corn Products Refining Co.

169 Now during the second period, when we came back, I and Mr. Frindel and Mr. Weiss, we were all three of us in the premises, in the store of Mr. Shapiro; and Mr. Shapiro told us if Mr. Frindel did not sell small quantities—will not sell to small saloon-keepers, he will take more goods, but he is only willing to pay \$1.40 for 150 proof; and this was the price that was paid until I left Chicago, \$1.40 for 150 proof, but he has taken more goods than the first period. In the second period I have delivered from 600 to 650 gallons of 150 proof brandy per week; Saturday night and Sunday morning most of the deliveries were made. The total deliveries of brandy to the defendant Shapiro during the first period was about 400 to 450 gallons a week as many weeks as we had been working; about 6 or 8 months we were working; that would be about 11,000 gallons the first period; and the second period about 14,000 or 15,000 gallons. These were not tax paid. We made the deliveries of the tax paid goods—of the non-tax paid goods—Saturday night or Sunday morning. We delivered the tax-paid goods around Wednesday or Thursday, after the use of the barrels with the stamps all
170 week; then around Wednesday or Thursday, when we got through with the trade, we put mucilage on the tops, and put on these stamps tight, and delivered to Mr. Shapiro a barrel or two, and to other trade a barrel or two, wherever it was necessary.

I had a talk with Mr. Shapiro about why he needed tax-paid goods in the store; that was down in the beginning—that he needed tax-paid goods in order that they should get the smell as rectified—in order that it may give a smell to the tanks of the goods, because this spirit had a different—has got a peculiar smell—than any other spirits that is made in the market; and therefore the tax-paid goods were necessary in a rectifying place, that it shall cover up the other goods.

I made collections from the defendant on very few occasions; Mr. Frindel and Mr. Weiss were collecting from the defendant. I would not state how much tax-paid goods I delivered to the defendant; possibly around 3,000 or 4,000 gallons; I wouldn't say how much, during the whole period of time.

I don't know what these checks were for (referring to bundle of checks handed witness by District Attorney); they were for goods—for cash or for checks, I don't know. It is possible that once or twice

I came there with checks and got Shapiro's checks.

171 This one to Rose Bronstein, was a check that I got from Mr. Shapiro, and sent it down to Baltimore to my wife to live on; but I would not positively state if I gave him the cash at that time or gave him other checks; or small checks which Frindel

gave me to cash, to change. It did not have anything to do with the business between Shapiro and the distillery.

These other checks I remember they were for brandy or cash; I wouldn't say what they were for. I am unable to state what the checks were for. On the several occasions I collected for the delivery of the brandy, it was paid mostly in cash, by Mr. David Shapiro.

I had a conversation with the defendant Shapiro about the Government officers; that was on a Saturday night when I came there with four barrels on the wagon. Mr. Shapiro says to me that he thinks there is an officer on the corner watching his place, and he told me that he called up the distillery about it, that no goods should be sent down to him. I said, "It don't make no difference whether there is a Government officer there or not; these barrels have stamps on." So I left the barrels in the place, and I did not get them back that evening; but I got them back early in the morning, the barrels and the stamps. At that time there was in the place his son, and Mr. Weiss was sent out from the distillery. He came at that time, and I had already left the barrels. Shapiro said he had telephoned to the distillery; and Mr. Frindel sent out Weiss to the place. Weiss had left the distillery to try and catch me; when he reached there the barrels were already unloaded, but each one had stamps on.

On two or three occasions I delivered jugs of brandy to the defendant, about 120 to 150 gallons of 150 proof goods. That was not tax paid. There were no stamps on the jugs when they left our place.

Mr. PARKIN: A jug under five gallons is not required to bear any stamp.

The WITNESS: They were four-gallon jugs. That would not require a stamp if it had been previously paid.

The method I have described of delivering to the defendant was true of each and every delivery that I made to him at the time I was in Chicago; and what the other people at the place of business also did each time.

On several occasions I have seen Mr. Shapiro's handwriting, and I believe this is Mr. Shapiro's handwriting and signature (indicating letter handed witness by District Attorney). That is his signature in Hebrew. I can pretty nearly translate it (referring to letter).

Mr. PARKIN: I offer this letter in evidence.

Mr. O'DONNELL: We consent that the translation may go in as the original.

Said paper was admitted in evidence and marked Government Exhibit 80, and is in words and figures as follows, to wit:

Mr. PARKIN (reading):

6/18/09.

MY DEAR MR. FRINDEL: Your friend Mr. Grossman handed to me two bills of lading for a barrel of 90 and 135 shipped in the name of Schreiber. Now it is as follows: 1st. I do not want to sign Schreiber's name, nor would I ask him to sign it, and then I do not know what you would charge me, because I do not want the barrels with

the single stamps at all. I want little kegs of tax paid by the distiller, therefore write me how much it will cost me 100 proof. At all events, more than \$1.80 per 150, Chicago, I won't pay. Answer at once what is going on with Max and Weiss. In St. Louis there is, thanks to God, also a distillery, as I was told. The people there are the Hudson people. Their price is \$1.50.

Your friend,

DAVID SHAPIRO.

174 The WITNESS: That letter was dated June 18, 1909. I was in Baltimore in June, 1909; and Weiss lived in Baltimore at that time too. Frindel's home was in Brooklyn; I don't know if he was there all the time. When I and Weiss were there, he was in Brooklyn.

I had a conversation with the defendant about October, when I started to deliver. He asked me, "Why do you bring bills when you don't leave them?" I told him I brought bills along with me in case when I reached the place—if an officer was there, I am supposed to leave a bill with the barrels; if the officer is not here, and the barrels were emptied and the stamps were returned to me. I took the bill along back and destroyed it or returned it to Mr. Frindel. I have not got any of those bills here.

MR. PARKIN:

Q. What did those bills state on them?

MR. O'DONNELL: I object.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. They stated the price of three dollars a gallon, 150 proof; it was always the same.

175 Myself, Frindel, Frank Weiss and the brother are all under indictment, charged with having violated the law—charged with helping to violate the law. I have entered a plea.

On a Sunday in December, 1909, was delivered more than any other Sunday, as it was before Christmas and the New Year holidays, Mr. Shapiro, in an off-handed way said if the Government officers "had only known what we have done today"—he smiled at it—and of course I left the place. I did not have anything to answer to that remark. That Saturday night and Sunday I delivered about a thousand gallons that week. A man by the name of Mullen delivered several times with me.

The WITNESS: He helped to deliver with me; he was present; on one or two occasions Frank Weiss also delivered. My part of the duties in that place was delivering and bringing in goods; but I understand the entire process. I took care of the outside work; I don't believe that I was more than an hour or two a day in the place.

When I speak of stamps upon barrels I refer to United States Internal Revenue stamps, representing the payment of taxes; and that is true whenever I speak of the term stamp."

176 Cross-examination.

By Mr. O'DONNELL:

The check dated November 20, 1908, made payable to Rose Bronstein for \$150 and signed "David Shapiro," has my wife's endorsement on it. She lived at that time in Baltimore; I sent her that check. The signature that follows hers is a lawyer by the name of "Rich," who collects the ground rent; I have seen him once or twice; I lived in the house that he collected the ground rent for. I got that check from Mr. Shapiro.

The check of December 21, 1908, made payable to Max Bronstein, for the sum of \$225, the first endorsement on that is my signature; the second endorsement is I think my signature for F. Weiss; I think I put his name on his account. It was not my habit to sign his name, not on checks; but to endorse to deposit sometimes I did; I don't know which this was for.

The check of November 25, 1908, made to Max Bronstein, for \$250; the first endorsement on that is mine; the second, F. Weiss, Mr. Weiss wrote that. The last signature is mine. It is "Max Bronstein, pay to the order of F. Weiss, Max Bronstein." Then it follows he deposited the check; the check was deposited by him; he had a bank account.

177 On the check of November 28th for \$325, payable to Max Bronstein, the first endorsement is mine and the second is F. Weiss.

On the check of November 11, 1908, made payable to Max Bronstein, for \$40, my endorsement is on the back.

On the check dated January 2, 1909, for \$3.60, payable to Max Bronstein, mine is the first endorsement, and then somebody else by the name of Cohen; I think he had a cigar store across the street from Shapiro, and Mr. Jake Shapiro cashed it; he went in and cashed it for me for cash. The way Cohen's name got on it is he had to deposit it to collect it; it was cashed in his store. Because his name is on last, I imagine he deposited it. The last signature names him the owner of the check.

All these checks are signed by Shapiro.

The one of December 27, 1909, for \$300; that is my writing and my wife's endorsement; she lived at that time in Baltimore. Rose Bronstein's endorsement is the only endorsement on it; when I wrote her endorsement I was right here in Chicago; it was cashed in the restaurant called the West Side restaurant, it was on the corner of 12th and Halsted street—the West Side Trust & Savings Bank.

The check of March 17, 1909, for \$150, payable to cash; it is O. K'd by David Shapiro and has my endorsement.

178 The one dated March 30, 1909, for \$3.60 and payable to cash, was O. K'd by David Shapiro; and I endorsed it in my own handwriting.

The one dated March 8, 1909, for \$33, payable to cash, is endorsed by me in my handwriting.

The one dated August 4, 1909, payable to cash for \$350; the first

endorser is D. Shapiro—that is, it is O. K.'s by D. Shapiro. It is endorsed "Rose Bronstein, 214 N. Bond street;" she lived at that number all the time, in Baltimore.

Check of January 29, 1910, for for \$64.60, payable to cash; Rose Bronstein's name is written on the back.

One of August 6, 1909, payable to cash, for \$200. My signature is on the top of that? And Louis Mendelsohn—he is that gentleman who sits right opposite me (indicating man in court-room); he is a liquor dealer on Madison street, three or four blocks from Halsted street. I gave him the check.

The check for \$151.78, dated September 27, 1909, that is my writing on the back.

The check, dated December 9, 1909, for \$89, payable to 179 cash: my signature is on the back of that.

Check for \$300, December 9, 1909, payable to cash; my signature.

Check August 16, 1909, payable to cash, for \$207; that is not my signature (indicating); then mine, and then mine is scratched out. I wrote my wife's signature. I cashed that check here in the bank in Chicago.

Check of January 29, 1910, payable to cash for \$200, has my wife's signature signed by me.

Check of January 24, 1910, for \$100, has my wife's signature, signed by me.

Check of January 10, 1910, payable to cash for \$234.16, has my wife's signature, signed by me. I got the cash.

Check of December 6, 1909, payable to the Illinois Fruit Distilling Company, for \$342.48; my name is on that in my handwriting. I think the writing "Illinois Fruit Distilling Company" is mine, but I would not positively state that it is.

Check of December 21, 1909, "Ill. Fruit Distilling Co." for \$208; the top signature is Mr. Frindel's, Simon Frindel's endorsement, and mine is the bottom, the last, that is mine.

Check, dated July 26, 1909, for \$200; the last signature 180 is mine; it is O. K'd by David Shapiro and cashed by me.

Check of January 18, 1910, for \$153.67, to the Illinois Fruit Distilling Company; the last signature is mine, all my handwriting; I signed my wife's name; the endorsement above it is Mr. Frindel's or Mr. Weiss—I would not state who wrote it. I would not positively state it was not my own writing.

Whereupon the further hearing of this cause was continued until Monday, October 14, A. D., 1912, at ten o'clock A. M.

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CHICAGO, MONDAY, October 14, A. D. 1912—
10 o'clock a. m.

UNITED STATES

vs.

SHAPIRO.

At this date and hour court met pursuant to adjournment.
Parties as before.

On account of the absence of one Juror, the further hearing of
this cause was continued to 2 o'clock p. m.

CHICAGO, October 14, A. D. 1912—2 o'clock p. m.

MAX S. BRONSTEIN resumed the stand, and further testified as
follows:

Cross-examination (cont'd).

By Mr. O'DONNELL:

The four checks (handed to witness), dated November 20, 1908,
November 23, 1908, April 12, 1909, and August 4, 1909, the
182 first being for \$150, the second for \$40, the next for \$200
and the next for \$350; the first one I stated that I sent to my
wife in Baltimore; the next one I sent to Baltimore; I sent the four
checks to my wife in Baltimore. Two or three of these checks I be-
lieve I got personally from David Shapiro. When I got them from
him, the first one for \$150, I gave him two or three little checks and
some cash, and got his check for \$150 and sent it to Baltimore. The
second one of \$40 I believe I gave Shapiro cash or a check for that.
The third one for \$200, I got that check from Shapiro for Frindel
for goods; that was the last period of the first time. The one of
\$350 I got from Frindel in payment of distilling apparatus; there
is no endorsement of Frindel on it; it is the endorsement of my wife
in Baltimore.

For working here for Frindel I received \$25 a week and five per
cent commission on the sales—the profits on the business; that was
all, with the exception that the distillery at first in Baltimore was
mine, and sold in Baltimore to Mr. Frindel. The \$25 a week and
5 per cent on the sales is all I had; I had no interest outside of that.

That interest of \$25 and 5 per cent continued all the time I
183 was here in Chicago. Frindel owned the distillery as he
paid for it. Frank Weiss also got \$25 a week and five per
cent; he was the distiller. I was on the witness stand against Frin-
del; so was Weiss. The whole thing was owned by Frindel; and
neither myself nor Weiss had anything to do with it except as hired
men. My wife Rose Bronstein never was in Chicago. Before this
work out on Quinn street, I was a distiller before in Baltimore; I
bought some stock I guess around 1904 and 1905; for several months
I was running it at Baltimore. I had an interest in the apparatus
to the last day of the sale; the plant I had an interest in four or five
months that I was running it. I only owned stock in it a few

months before I ran it, three or four months. Between 1904 and 1908, I was out of the distillery business; I owned it while it was not running; I had a financial interest — it during all that time; it was sold around August, 1908; I owned it from 1905 until it was sold. There was no one in business with me of my family in that place. My father, Abraham Bronstein, had an interest in it when it was running for the Monumental Distilling Co.; there were four stockholders in it. I had an interest in it then. My father was in for a period of three or four months when the Monumental was running it.

184 My brother did not have an interest in it with me. I had a brother who was a rectifier in Baltimore. His name was Gershon Bronstein. He was about three or four years a rectifier in Baltimore; he went out of business last year. We shipped some goods to him.

Q. Did you get into trouble with the Government while you were in Baltimore?

A. I wouldn't call it trouble. I have paid an assessment on making wine in the distilling place, of \$500; I paid that to the United States Government.

Q. You were doing it illegally, weren't you?

A. It wasn't illegal; it was a wine made from imported fruit, that the officials at that time did not know that there was a duty on it; afterwards they found there was 8 cents bond duty on imported currants that came from Greece; later on, when they found a tax on it, they assessed me \$500, and I paid it.

Before my distillery was brought here, it was not idle at all; Mr. Frindel was operating it four or five months in Baltimore; he leased the distillery from me. There was a judgment against it there; it was a judgment against me; it was about eight hundred odd
185 dollars. The judgment was not put on the plant. The judgment was gotten about I think 1906 or 1907. There was no levy made on the plant; that judgment was paid—my people settled it I believe about a year ago; it was settled later than when I was on the witness stand against Frindel.

Before I came here I knew Frank Weiss; I had known him about a year and a half before I came to Chicago. I had met him working at the distillery in Baltimore. He worked for a man named Abraham and then he worked for Frindel. I rented my plant to Abraham. Weiss was working a little while with me—a couple of months. I paid Weiss \$20 salary while he worked for me in Baltimore, \$20 a week. I don't know why Weiss left there; I know he came here to work for \$25 and 5 per cent, the same as I; I did not come here to work. When I did come I stayed here until about February, 1910. I sold to 14 liquor dealers while I was here in Chicago.

While I was in Baltimore I was a rectifier also. The name of my rectifying establishment I think was Princeton Distilling & Distributing—I don't remember—I think it was Princeton Distilling Co. I was running my rectifying establishment while my brother

186 was running his; two separate ones; my father was not in the business at all. I did not run my rectifying plant long, from about January until in May I believe, 1908; I was not running the distillery at all at that time; it was leased to Abraham, Frindel leased it later. When it was shipped out to this city it was consigned to Simon Frindel.

The names of the *the* fourteen men to whom we sold the products of that distillery while here in Chicago were: David Shapiro, Abraham Tucker, Lewis or H. Levin; a fellow in Chicago by the name of Leffkein—I don't know his first name—a fellow by the name of Weiss—I think it is Bernard, or something like that; a fellow by the name of Cohen, on State street; a fellow by the name of Natenberg—Shimberg—I don't know if it is Harry—Sigmund Natenberg; a fellow by the name of Rosenstein; that is all I can remember now as far as I can remember now.

When I was delivering goods to David Shapiro, I delivered jugs on two or three occasions; that was I think about the end of the year 1909; it was during the two or three weeks in that period of time; they were four-gallon jugs; they were paid either by check or cash; I have not done all the collecting. I wouldn't say that he ever paid any cash; I believe he did.

187 In the first period of time just us two, Weiss and myself, came from Baltimore; then we had another workman there; his name was Levinsky. Selzer was not a Baltimore fellow; he came when the distillery started operating; he came from Brooklyn, New York, or the Bronx. I knew him before I met him in Chicago about a year. I met him in New York. He had some connection with the distillery at the beginning; he started to rectify at 497 Blue Island Avenue; he did not start in the distillery with me, I wouldn't say; he didn't work in the distillery at all. I was here a month or six weeks before I met Mr. Seltzer; the rectifying plant was at 497 Blue Island Avenue. Mr. Seltzer is now in Philadelphia I believe. I have not seen him since he was indicted in Philadelphia, about two and a half or three years ago. The name of the rectifying plant on Blue Island Avenue was the American Distilling & Distributing Co. Seltzer was running that until about January 1st, 1909.

I had a bank account in Chicago in my wife's name in the West Side Trust & Savings Bank; that was in the second period, while I was working and collecting for the plant for Mr. Frindel. I believe the Illinois Fruit Distilling Company had an account in several banks; one was in the *West* West Side Trust, 12th and Halsted; there was a deposit there "Illinois Fruit Distilling Co." signed by Frindel—that is where the deposit was; and in the Hamilton Bank; I couldn't say when that was, but I know he had an account there. He was depositing in three banks in Brooklyn. And I believe for the same period of time, for a month or two, he was in the Kaspar Bank.

I would not know how much money I deposited in the last eleven months in the West Side Trust and Savings Bank; I collected, deposited and drew.

I did not while I was here buy a diamond and send it to my wife.

I would not say positively whether the Illinois Fruit Distilling Co. had an account in Kaspar & Carroll's Bank, at Blue Island Avenue, at the same time that they had a deposit in the West Side Trust & Savings Bank; but I know they had one.

While Frindel was depositing in his own account, I possibly did deposit a thousand dollars in the West Side Bank.

Q. During the month of July, 1909, deposit to your wife's account in that bank \$81.80 to your wife's account?

189 A. I could not say each and every item; it is too long back.

Q. Well did you make a deposit?

A. I wouldn't deny it; I don't remember.

Q. Did you deposit to your wife's account in August 1909, the sum of \$807.68?

A. Possibly I did.

Q. Do you know whether or not in September, 1909, you deposited over \$800 to your wife's account in that bank?

A. I would not know, but I never deposited in the West Side Bank; I wouldn't know how much per month or how much per day.

Q. But you know in October, 1909, you deposited \$990?

A. I would not know it.

Q. Or in November of that year \$3,296?

A. Possibly; I don't know.

Q. In December, 1909, \$6,456?

A. Possibly.

Q. In January, 1909, \$6,196, would you say you deposited about that much?

A. I would not know, but I suppose the bank is correct; they keep books there.

Q. In February, 1910, \$2,300?

A. I could not say anything much; I don't remember.

Q. Do you know whether or not in the last eleven months that you were here, you deposited in the West Side Trust & Savings Bank, under your wife's name, over \$22,000?

190 A. I wouldn't know if I deposited \$22,000.

Frank Weiss kept his deposit in Kaspar's Bank; I went with him to cash checks; some of them were checks made payable to me. I believe that Weiss was carrying an account in Kaspar's Bank the first period of time about April, 1909—from April, 1908.

While I was here I did not buy a piano and send it to Baltimore. I did buy a fur coat for myself; I bought it right here in Marshall Field's. I bought a diamond while I was here in Chicago.

Q. Tell us the name of the man from whom you bought the diamond?

Mr. PARKIN: I object to that.

The COURT: Objection sustained; we are getting pretty far afield, Mr. O'Donnell. He said he bought a diamond; now what difference does it make from whom he bought it.

Mr. O'DONNELL: Now suppose I find out from whom he bought it, and find he paid \$1,200 for it; it would then be very material in the

case as to whether he is telling the truth under the circumstances. He is only a hired man, and it is a question—

The COURT: Oh, well, I think you have got plenty of evidence in the case on that; he has not testified that he was only a hired man; he said what he got from this Distilling Co. was \$25 a week and five per cent profits. Well, one person might call that a hired man; another person would consider it a pretty good position; and, consistently with that, he might have other employment and other sources of revenue. Now I think if we are going into the place where he bought his pianos and diamond, we can stop at the place where he buys his shirts and socks; it seems to me it is very beside the issue.

Mr. ZOLINE: If the court please, we would like an exception to the remarks of the court, as indicating—

The COURT: The jury will understand that when the court talks to counsel, that it has nothing to do with the evidence in the case. The only evidence which you are to consider, is the evidence which comes from the mouths of the witnesses and from the documents that are received in evidence; and you are to disregard entirely the conversation between the court and counsel and between counsel. Objection sustained.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

The WITNESS: Most of the times that I delivered goods to 192 Shapiro, I generally saw Shapiro. I started to deliver in October of 1908, October and November; I believe I seen him in December; then he went out a little bit on the road for a couple of weeks, and then he came back again; I seen him again; when he wasn't in, I delivered to the house, and it was accepted by his son, Jacob Shapiro.

(Stricken out.) I delivered from October, 1908, until April, 1909; then I started to deliver until about August 1, 1909, and have delivered until about the middle of February or the last of February, 1910.

I don't know who David Shapiro's salesman was. For six weeks preceding the Jewish Easter, 1909, David Shapiro was on the road; I don't remember what weeks they were; I don't know what cities he visited. He was out on the road about two or three weeks, and then he came back for about eight or ten days and went out again for a couple of weeks.

Mr. O'DONNELL:

Q. Isn't it true that David Shapiro, with the exception of three days, was out of his place of business three months preceding the Jewish Easter of 1909?

A. It ain't true. He was out about five or six weeks altogether during the whole winter. I don't know how long he was out in 1910, because he was sickly at that time; I don't remember; 193 he got sick around February with appendicitis and was taken to the hospital; when I left Chicago he was in the hospital;

before he went to the hospital he took a trip and was out for a few weeks; he was gone about two weeks before he got down with appendicitis, and came back for a few days, eight or ten days, and went out again for about two weeks. I don't know if he was sick any at home before he went to the hospital; I don't know what.

I went and got the sugar with which this distillery was operated; the sugar was purchased under two different names; the first name was purchased by B. Blum; I did not purchase, I simply paid for the sugar. Mr. Frindel was not once in the sugar plant; at the office he was there half a dozen times. The other name used was P. Himmel. That was used during the second period; we went to get the sugar in the second period the same as in the first; the Corn Products Refining Co. and turn in from Canal street over the railroad track—I don't know whether you call it Taylor street. When I got the sugar I had to sign a slip; I signed "P. Himmel" and "B. Blum"; and during the first period I signed the same names, whatever the delivery was for. I wouldn't know how many
194 times I got sugar in P. Himmel's name; I guess maybe two hundred times. I would not know how many times I signed B. Blum's name. I used the name "B. Blum" before I used P. Himmel."

I got the sugar with the wagon; the man at the sugar factory helped me load it; I hauled it most of the times to the distillers; sometimes to the warehouse; the warehouse was right in the back of Archer avenue—a little stable rented from a barber shop; the barber shop was in front. I would get a carload at a time, by taking 20 bags out. There were used 20 bags in the tanks; if we worked ten tanks in a week we used 200 bags, if we used only three tanks we used only sixty bags. It took in 20 bags. A car would hold 500 bags; there were 112 pounds in the bags. 20 bags would make 160 gallons of 150 proof; about 240 gallons 100 proof; that includes the few raisins or fruits that we had for covering and the sugar. We did use some raisins and fruits in distilling; we had to use some to make a covering for the tanks in order that if any Government official comes to see what it is made from.

Mr. O'DONNELL:

Q. So that the fruits and raisin seeds were simply to fool Government officials?

195 A. Yes.

Q. And were not, as a matter of fact, a part of your distillation?

A. Oh, some goods, some prunes will generally give some brandy, so will raisins or raisin seeds; they give some portion of it, but very little. It wasn't exactly for the flavor; it was for the coloring of the tank. We got the raisins or grape seeds and so on from a concern on Lake, or East Randolph—some wholesale grocery there; I don't exactly recollect the name; and we got from Lippold and another fellow, and then we got from Earl Bros., or something like that—three or four places; I could take you down to the places, but I don't remember the name.

When we went over to sell goods to Shapiro on Saturday nights

and Sunday mornings it was to prevent Government officials from catching us; and most of the times he stood at the door watching; he told me on a few occasions to come at that time as the Government officials would not be around at that time.

Q. Shapiro said that they would not work on that day—Saturday night or Sunday?

— Well I would not say he said they did not work; but the Government officials generally don't work after Saturday evening. I knew that.

196 Q. Do you remember saying Saturday or Friday, that that is what you said Shapiro said, that they wouldn't work at that time?

A. Possibly Shapiro said that too. I delivered to no one to nobody else with the exception of Shapiro on Saturday nights.

Q. To whom on Sunday morning?

A. To Philip Blume; his place of business nearly goes right into Blue Island avenue.

Shapiro paid \$1.80 for the first liquor; he paid as much for the liquor with the tax on it as the liquor that did not have a tax on it; he paid \$1.80 a gallon for liquor that did not have a tax. Of brandy at \$1.80 upon which there was no tax paid, he bought—I would not think it was over a thousand or twelve hundred gallons during that month, of 100 proof. A gallon of spirits is never any less than \$1.30, when corn is very low, today it is about 1.37¹/₂, with the tax paid, 100 proof.

In October, 1908, we have delivered in that month between 350 and 450 gallons of 150 proof, untaxed; that was the beginning of the operations in the trade. During that month we sold him I presume a couple of barrels; I would not know how much. The barrels would hold 50 or 49 wine gallons; about 70 or 74 proof gallons.

197 It was all as far as I can remember 150 proof. In October when I say we sold about 450 gallons 100 proof, I mean a week. By 100 proof I mean stuff only at 100 proof strength. Most of the goods sold him in October, 1908, was 150 proof—I put the gallons in at 100 proof because in talking of a gallon means 100 proof; it does not mean 90 or 150; a gallon of goods means 100 proof; in cases 150—it means a gallon and a half.

The COURT: Let me ask a question: Did you deliver anything to Shapiro during the time covered by this indictment that was less than 150 proof?

A. Yes, as far as I can remember. During the month of October we sold him of 150 proof tax paid, a couple of barrels; I wouldn't know if it was five or six or two or ten barrels that month; I wouldn't remember; it is four years back. We sold him of what was not tax paid in the neighborhood of between 350 to 450 gallons a week of 100 proof; about four or five barrels of 150, and sometimes six barrels. He paid \$1.80 for tax paid gallons all the time. For the untaxed goods he started to pay \$1.80 and then \$1.; during the month of October \$1.60. During that month he paid \$1.80 for the taxed goods.

198 I would not know by months how much taxed goods I have delivered; I would not know how much goods I have delivered him. During all the time that I was there every month I hauled him some tax paid goods, in barrels; they were sold with the stamps on.

Mr. O'DONNELL:

Q. Now tell us when you sold the stuff in jugs, was that tax paid or not?

A. Well, that is a very ticklish question. In the distillery a good many were filled up direct from the tank, that wasn't tax paid, and then we filled them up in the retail room from untaxed barrels; but the barrels for these jugs, even they were not paid—because these barrels were a dozen times filled and refilled and unfilled. To the best of my recollection the jugs that we sold him were untaxed paid goods; except a few jugs all were untaxed paid goods, the price that I got for them was for the untaxed paid goods. The brandy that was sold to him, taxed and untaxed, was taken out of the same general vats, the same place all the time.

I did not say they smelled differently; I said it has got the same smell, and if the revenue officer would come in to test the spirits, and find it has got a smell to it, he would absolutely ask as
199 far as I know "Where does that spirit come from" because it has a different smell from any grain spirit, therefore he demanded tax paid goods in order to have it entered on the Government books, and take those goods and put it in the rectifying tanks without spirits, to mislead the Government officer. During the time we were running he bought I guess three or four thousand dollars worth of tax-paid goods; we were not running quite two years; we were running in two seasons.

When a genuine or real stamp would be used, Mr. Frindel sometimes sent Mr. Weiss with the money to get the stamps. I would go down and buy some. The stamp cost \$1.10 for as many gallons as you demanded. If a stamp was put on and was brought back to our place and put on again we would not have to pay for it the second time. It was in the distillery that the stamps were put on that were brought from the Government; those we had to pay for. It was in the distillery also that the stamps that had been used before were put on; it saved the distillery the price of the stamp. I would not be able to tell during the time of the running of the distillery how many stamps were re-used by us, Frindel and
200 Weiss, or by the distillery that were not paid for. Some weeks stamps were used a dozen times; some weeks only used three or four times; and each time they were used they saved the \$1.10 to the distillery. I knew they were being used; I carried them in my pocket and carried them back to the distillery; and myself put them on, helped to, and helped take them off barrels. And I worked at that system of taking them off and putting them on for two seasons.

Mr. O'DONNELL:

Q. And every time that you took a stamp off you knew that you were violating the law, didn't you?

A. Violating the law? I didn't violate—

Q. Every time you put one on to a barrel, you knew that you were defrauding the Government out of \$1.10 for every gallon in it?

A. Yes.

Q. And you yourself saw the same stamp and helped use the same stamp as high as eight or ten times a week?

A. Yes.

Q. Now tell us how much that distillery defrauded the Government out of in those two seasons?

A. Well I wouldn't exactly specify how many gallons it defrauded the Government; but I believe, according to the records of the sugar—the distillery has so made not less than about 80,000,000 gallons and paid taxes for about ten or twelve; I think the distillery has made between eighty and ninety thousand gallons.

Q. Well take it at 80,000; they should have paid \$88,000 to the Government?

A. Yes. They paid to the Government about \$10,000 or \$12,000. I would say that the distillery defrauded the Government out of about \$75,000, about that amount—a few thousand less, or more, in about twelve or thirteen months altogether. And that fraud went as profits to the distillery. It went as profits to the distillery instead of taxes to the Government.

As well as the fourteen houses here, some goods were shipped to Brooklyn, New York; the name of the person to whom we shipped was J. Berliner. We shipped to him a few months in the first period; we shipped him about 4 or 5 thousand gallons of 100 proof, in the neighborhood of four or five thousand of 100 proof. It was shipped all in small kegs—47½ kegs. I didn't weigh the kegs; I think a keg will weigh about 50 to 60 pounds; the shipments were five kegs at a time. We shipped to him under fictitious names; That was during the whole period we shipped under fictitious names to him; we shipped to him only during the first period of operating here.

We did not ship to anybody else in New York except Berliner. We shipped to two parties in St. Louis, one was to a party named Horwitz; I don't recollect his first name; we shipped to him during both periods. I would not say how many gallons we shipped to him; he wasn't a heavy buyer, but I guess it was around a thousand or maybe a fifteen hundred gallons during the whole time. The name of the second man there was Alschweinger, or something of that name; I don't know where his place of business is either; I was never in St. Louis. We shipped to him five kegs at a time; I guess he bought may be 400 or 500 gallons. We did not ship to anybody in Boston or Philadelphia. We shipped to my brother in Baltimore, Gershon Bronstein. We shipped to him during the first period; we did not ship any barrels to him; we shipped to him in small kegs.

The goods shipped to my brother was taken out of the retail room; I don't know if you would call it tax paid or not. The distillery had \$25 license, which entitled Mr. Frindel to sell anything less than five-gallon goods for taxed barrels that were full; the *the* place was two corners—three corners—the distillery is right there—
 203 I can show you the picture (indicating). The kegs were filled up from barrels that had stamps on; in one sense of the word, if the barrels had stamps on; the kegs would have been tax-paid; but these barrels may have been re-filled half a dozen times, and then they were not tax paid.

The COURT:

Q. Didn't they have the same kind of stamps on the same as you have been testifying about were taken off and used from time to time?

A. These stamps were on these barrels, yes.

Q. These removable stamps?

A. These removable stamps; they were in the retail room, and clamped down tight, so that they would not be able to be removed.

Mr. O'DONNELL (examining):

During the first period of time, I shipped to my brother in Baltimore some stuff. We shipped some to Cleveland, to a party by the name of Bernstein; I don't know if the name is Bernstein & Son; I don't know where his place of business is; the goods were delivered at the depot; we shipped there several hundred gallons—400 or 500 gallons; that was some in the first period and some in the last.

204 We shipped to a man named Frindel in Minneapolis; Frindel told me it was his brother. I have delivered myself to him about a thousand gallons, and Mr. Frindel has shipped him a great deal more than I did not deliver. There was shipped from the distillery to him about two or three thousand gallons. We did not ship any stuff to Philadelphia; we shipped some to Connecticut, to a party by the name of Quint; that was to New Haven. I believe that was during the first period. We did not ship anything from the distillery to Cartoon in Philadelphia. I did not deliver any other as far as I know to any other cities, with the exception that I heard Frindel had shipped to a party by the name of Rose or Rosen, or something of that name, in St. Paul, Minneapolis, some place near where his brother was at; but I wouldn't know how many gallons; I haven't delivered that.

All the shipments that went to Berliner, the bill of lading went to Frindel's son; Frindel's son is a lawyer in Brooklyn, and the bill of lading was sent to him, and he collected for the goods before he delivered the bill of lading; that is what I believe.

Mr. O'DONNELL:

205 Q. Can you name one foreign receiver of your goods, upon which you can say that the Government tax was paid before you sent it?

A. I have answered that question before, that it came from the

retail room, and it is for the court to decide whether it was tax paid or not; I wouldn't say whether I would call it tax paid or not tax paid.

After these stamps had been used all week—on the goods that Shapiro took—untaxed-paid goods—after these stamps had been used all week to work with around the trade, and they were used six times or twelve times, after we were done working for the week, we pasted them on, according to the Government requirements, and clapped on the tax tight, and it was delivered to Shapiro, and sent that way to Shapiro.

Q. After it had been used a week?

A. After they had been used eight or ten days or six days, for that long period of time.

Q. When did you first know that the Government was after you, that the Government was inspecting?

A. That the Government was inspecting?

Q. That they discovered you were fraudulent?

A. They were permitted to inspect all the time; they kept on going all the two years that the place was running. I don't think I was there when the Government inspectors were there; I was most of the time outside; I was delivering and bringing in sugar and so forth.

Q. Did you have your distillery arranged in any way that would give you a signal when a man would be coming in?

A. It was fenced around the distillery about 12 feet high, and to the door there was a bell that you would have to ring the bell before you would come in. Now the working men had a certain signal, that they would ring the bell and the people inside would know that it was a man of the place; any stranger of course would ring different; and we would be able to distinguish between the working men and the strange men. If there would be a stranger's signal and a stranger was coming in, we wouldn't do anything. Simply be ready to take him in. The Government inspector had to ring the bell to come in, and generally it wasn't the same sound of the bell as was used by the workingmen—we knew if it was a stranger; if it was the Government inspector, or any stranger, we could not distinguish until the man came in. The workmen had one bell, it rang three times. If I had been in the inside of the building, I could tell from the way the bell rang by the number of times whether it was a stranger or Government officer; when the bell rang three times, then we knew it was a man from the place; and if any other ring, why we would know it was a strange man.

The distillery started to defraud the Government from the beginning on.

The first time I went over to Shapiro's it was with Frindel; it was Frindel brought me to Shapiro; I had never seen Shapiro in my life; we stayed there maybe an hour or hour and a half, maybe half an hour; Frindel left Friday evening for St. Paul to see his brother; I left Saturday night back for the east. It was at that Friday meeting that I heard the talk between Shapiro and Frindel as to the two stamps. It was the first time I had ever seen Shapiro; I don't know

if Frindel had ever seen Shapiro before; he only told me that he was in Chicago. Those two stamps I saw there were Government stamps; I should think they were tax paid stamps; there are tax paid stamps, and there are stamps that people don't pay any money for. I think these were tax paid stamps; as to whether they were wholesale or tax paid, to state positively, I cannot; it is over four years, but I think they were tax-paid stamps of the distillery.

208 I know the difference between tax paid and wholesale; a man don't pay for wholesale stamps if he is changing them for rectifying stamps; I wouldn't positively state how many gallons they indicated they were for. They were barrel stamps; I can't indicate how much money each stamp was worth; I don't know what kind of liquor they were for. I remember that they were barrel stamps because Mr. Frindel asked Mr. Shapiro for the two barrels, and he said, "The two barrels have left east a day or two ahead of time." If they were barrel stamps for liquor they would be worth \$50 or \$75; it depends on the proof. Then Mr. Frindel gave him \$5; he wanted more, that is, \$5 apiece, \$10 for the two.

Q. And they would be worth about \$100 or \$50 apiece, wouldn't they?

A. To Frindel?—they were; to Shapiro they weren't worth ten cents.

Q. Well to a crook they would be worth that, wouldn't they?

A. Yes. I knew, or at that time I understood fully that they were crooked stamps; and that the Government was being defrauded out of about \$100, \$100 or \$150.

Q. And you were a total stranger to Shapiro with the exception of that hour?

A. Yes.

209 Q. And he went through that fraudulent deal before you, a stranger, didn't he?

A. Yes.

Q. What was there crooked about you to indicate it was all right to perform a crooked transaction on an hour's notice?

A. Well, I don't quite see that you found anything crooked so far, if I can answer that question—put it in a different light. I absolutely thought that it ain't right; the proposition was made to Shapiro by Frindel in my presence; and I saw him giving him back the stamps.

I was indicted I guess in June or July, 1910. From that time to the present I have been here a dozen times in Chicago. I have never been tried. I was indicted in Chicago. Last week was the first time that I ever pleaded to the indictment.

Before I went east I visited all of the men that we did business with in Chicago; I visited Blume half a dozen times or maybe a dozen times. I talked to him and to everybody about settling with the Government. I went around to talk to these men for about six weeks in succession. The distillery was seized and everything was

210 already seized, six months ahead of time; I started to go around among these men after the seizure and after the indictments were brought. Then I started out among them

to try and see that they should come to a settlement. I came from the east to canvass around among them to raise money. I went to them to put up money. I also went to the men outside of Chicago to put up money. I went to Connecticut and went to Brooklyn; but at Brooklyn I have not seen the party personally himself. I only met his son, and we could not talk anything about it; and I went back to Chicago. I had several talks with my brother to put up money. He did not offer anything—to put up anything. I offered to put up \$750.

Q. Was this collection that you were undertaking to make up a collection for compromise with the Government?

A. I did not go for any collection; I simply went around that everybody who could who was going to put up money to settle the case. I was half a dozen times to Washington to find out the situation of the case; and I saw that the Government has got all the information that they want. I came to Shapiro and advised him friendly, not only once but a dozen times, sitting at the table talking together, I asked Shapiro to put up \$5,000, and other
211 people the same to settle the amount; the Government required \$30,000 at that time. Shapiro said at that time that he would have plenty of time to put up \$5,000 when he shall be before Judge Landis. All these other liquor dealers had looked upon Shapiro as the head of the business. Shapiro did not say it, but other liquor dealers said it; they said it to me.

The COURT That part that Shapiro is the leader of the liquor dealers is stricken out.

Mr. O'DONNELL (examining):

While I was going around and while in Baltimore I did not get any money from my brother.

I did not get any money from any men during the six weeks I was making the investigation. In these cases I have been called by the Government as a witness. I wouldn't positively state, but I guess ten or twelve times—eight times maybe—about that. I mean by that, in court.

Redirect examination.

By Mr. PARKIN:

Q. What cases did you refer to, in response to counsel's question when you said that you testified or were called to testify eight or twelve times?

212 Mr. O'DONNELL: I object.

The COURT: He may answer.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. I have been called to testify in Frindel's case.

Mr. PARKIN:

Q. Where is Frindel?

A. In Fort Leavenworth, or Leavenworth prison, whatever it is called.

The next case was Shapiro's case; the next one was Levinkind's. Levinkind is in Fort Leavenworth, at the United States Penitentiary. The next case was Rosenstein's; the next one Tucker's; the next one Blume's. I meant Rosenfeld's—I don't know his first name—I think it is H. Then I have been called to Brooklyn by the Government; I testified in the Berliner case in Brooklyn; and Cohen's case.

Now the machinery when it came to Chicago was consigned to Frindel.

213 Mr. PARKIN: Now, if the court please, I offer in evidence pursuant to Section 882 of the Revised Statutes of the United States, certain papers from the Treasury Department of the United States respecting a distillery at Baltimore, Maryland and Patterson, New Jersey, signed by Frindel, manager, August 24th to January 25th—

214 Mr. ZOLINE: We object to it; it does not relate to the Illinois Fruit Distilling Co.; it is only collateral and incidental, and these documents cannot be introduced against this defendant.

The COURT: Objection overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The COURT: I should like to see the certificate, however. There is no objection to the certificate.

Mr. ZOLINE: The additional objection is this distillery relates to a time prior to a time that defendant had anything to do with this distillery—to a distillery in Baltimore, and is no part of this indictment, and has absolutely nothing to do with the issues in this trial.

The COURT: The same ruling.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

The COURT: No objection is made to the certificate, so I presume it is in.

Admitted in evidence and marked Government Exhibit —.

Mr. PARKIN (examining):

215 The WITNESS: Mr. Frindel had only one distillery in Baltimore during the year 1908. I didn't know that he had a distillery in Patterson, New Jersey, at all.

Mr. PARKIN: I am going to ask the court to pay no attention to the Patterson, New Jersey, part of this certificate; they are all together, and I cannot separate them. I will offer the portion referring to the Baltimore distillery.

The COURT: Very well, it may be received so far as it relates to the Baltimore distillery, and for no other purpose.

Mr. ZOLINE: Your honor, we will save all the exceptions.

The COURT: Yes.

Said paper so offered and admitted in evidence shows the monthly

reports made by Simon Frindel to the Revenue Department of the United States upon the fruit Brandy Distillery of said Frindel at Baltimore, Md., showing the account of the various fruits used therein for the months of March, April, May, June and July, 1908.

216 When Frindel was at the office of the Corn Products Refining Company, there was a conversation between Frindel and a man who had charge of the selling, Mr. Larkin. These are the signatures of Himmell and Blum, I testified about (indicating on bundle of papers).

Q. State why the name of Himmell and Blum was signed to those documents?

Mr. O'DONNELL: Objected to.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

A. The sugar was bought first under the name of Blum; it was to defraud the Government, so that the Government should not know that Frindel was buying sugar in case they found out that sugar is used.

Mr. O'DONNELL: I move that the answer be stricken out.

The COURT: The objection is sustained where he says for the purpose of defrauding the Government, and it is stricken out. Strike it all out.

Mr. PARKIN (examining):

The WITNESS: We signed "P. Himmel" and "B. Blume" to mislead the Government officials.

Respecting the account in the West Side Trust & Savings Bank in the name of Rose Bronstein, I got the money that were put into that account from collections for the firm—what you would
217 call for Mr. Frindel deposited and drew cash right away to go and purchase sugar and yeast; and every evening when every collection was made, during the day, I had to return the balance to Mr. Frindel, if I bought 60 or 100 bags of sugar or a couple of pounds of yeast.

Q. Why did you put it in the name of Rose Bronstein?

Mr. O'DONNELL: Objected to.

The COURT: He may answer.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. There were two reasons why. One reason was that there was a little judgment on me in Baltimore. And the second reason was that Mr. Frindel did not want to make deposits in his name in case if at any time at all the Government will seize the place, or they had trouble in the place, and that they may go and look up his account in different banks, that they shall not find much money deposited or transacted by Mr. Frindel.

1909 and 1910 were the only times that I deposited.

Mr. PARKIN:

Q. Who deposited during the first period, from the time of the opening of the distillery down to 1909?

218 A. Mr. Frindel has taken in Mr. Weiss to the Kaspar Bank. I did not have any other accounts—bank accounts of this distillery and these individuals, with the exception of the West Side Bank. Weiss had an account at Kaspar's Bank; and I had an account at the West Side, the second period after Weiss stopped his account in Kaspar's Bank. When I opened my account in the West Side Trust & Savings Bank, Frindel closed his account in the Kaspar Bank.

Q. What became of the moneys you deposited in the West Side Bank to the credit of this company?

A. Every day it was deposited at one window, and at a second window drew cash to purchase sugar or yeast for the distillery.

On one or two occasions I went to the bank with the defendant; I was identified to the bank teller in order that he shall cash checks—introduced me; that was the West Side Trust & Savings Bank, the same bank on which these checks are drawn.

These checks, bearing upon their face the imprint of a rubber stamp marked "Paid" are Frindel's checks (referring to Government's Exhibits 31, 62, 61, 60, 75, 63, 65, 47, 62, 41, 49, 44,
219 52, 46, 53, 65 and 63); they were cashed by the paying teller at the West Side & Trust Bank. I received in exchange for those, cash. As to the other check this check (indicating) I have endorsed at Mr. Shapiro's place, and we went over and cashed it; it is only \$3.60, (Government Exhibit 76). This check (Exhibit 51) was endorsed by the Illinois, and I have cashed that check in the bank. This check (Exhibit 76) was cashed by Mr. Shapiro himself; there is no other signature on there.

Mr. PARKIN: That check is dated "Chicago, November 17, 1908, Pay to the order of F. Weissman or cash \$225, the West Side Trust & Savings Bank, D. Shapiro", and on the back is the endorsement "F. Weissman, O. K., D. Shapiro."

The WITNESS: I don't believe I got any more checks than these from Mr. Shapiro to take immediately to the bank and get the cash on without depositing. Those checks were for liquor, and some of these were for exchange of other checks. On a great many occasions I have gone with the defendant, Shapiro, to the bank when he would take a check, payable to himself or cash, and get the money out of the bank himself and hand to me for the payment of liquors.

220 The way I knew Mr. Shapiro's whereabouts just before the season of the Jewish Easter is, I came to the place to deliver goods, and I asked the son where the father was at, and he said he was out on the road.

Mr. O'DONNELL: I object.

The COURT: He may answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. PARKIN: Counsel can move to strike out the question he asked and answer.

The COURT: Well the court will strike out both last questions and answers.

Mr. PARKIN (examining):

The WITNESS: I was familiar with the whereabouts of Mr. Shapiro during all the time that he was in Chicago; I went to the place, and if I seen him there, he was in Chicago; and if he wasn't there, he wasn't there.

Mr. PARKIN:

Q. Were you present in Shapiro's place at any time when he called up the distillery on the telephone?

Mr. O'DONNELL: Objected to that; he was over that on direct, and it wasn't touched on on cross.

The COURT: He may answer; I don't recall it.

To which ruling of the court, the defendant, by his counsel then and there duly excepted.

221 A. No, I can't say I was in the place.

Mr. PARKIN:

Q. You told counsel that before you had been in Shapiro's place of business an hour, when you first came to Chicago, that the defendant Shapiro produced the two cancelled stamps from his pocket. Give us the conversation, if any, had between Shapiro, Frindel and yourself at that time, respecting you and your purpose in Chicago?

Mr. O'DONNELL: I object to that entirely; that has been gone over.

The COURT: He may answer.

To which ruling of the court, the defendant, by his counsel, then and there duly excepted.

A. He introduced me to Shapiro that I was the one—the owner of the distillery in Baltimore, or of the apparatus, and that he intends to move to Chicago; that there would be a big business and so forth all around. After we had been talking about an hour how the market is in Chicago, and how much goods Shapiro can use, and so forth, Frindel asked—I could not remember all the conversation—but Frindel asked Shapiro—“Where are the two

222 stamps of the two barrels of goods that I shipped you from Hudson, and he handed out the two stamps from his pocket, and he said “We will allow you \$10 on it.” Shapiro says “It ain't enough”, and Frindel stated “When we get to Chicago and we commence to do business, I will make you an allowance for more on that, as I am not making much profit on that goods.”

Whereupon the further hearing of this cause was adjourned until Tuesday, October 14, A. D. 1912, at 10 o'clock a. m.

CHICAGO, TUESDAY, October 14, A. D. 1912—

10 o'clock a. m.

At this date and hour court met pursuant to adjournment, and the following proceedings were had:

Present: Parties as before.

MAX S. BRONSTEIN resumed the stand and further testified as follows:

Redirect examination by Mr. PARKIN (cont'd):

The WITNESS: Spirits is a product produced from corn. It is not the same as brandy. Spirits, the price of it, is always about, as I said, 27½ and sometimes 30 cents a gallon, except the tax which would be \$1.30 to \$1.40. Brandy, the lowest it was ever in California, is about 30 to 32 cents a gallon; to reach Chicago, it would be about 30 or 40 cents a gallon of 100 proof, without tax,

224 means \$1.60 or \$1.65 100 proof delivered in Chicago.

It cost the Illinois Fruit Distillery to make the brandy about from 50 to 60 cents a gallon of 100 proof; 150 would cost about 90 cents. That was exclusive of the Government tax of \$1.10.

The cause of my visit to the place of the defendant after I was indicted, and the defendant was indicted—I came to Chicago because I was in Washington and had found out what it would cost to compromise the case for all the liquor dealers and everybody involved in it, and I was told that the least it would be was between \$25,000 and \$30,000 at that time from the Commissioner of Internal Revenue and other officials there. I came to Chicago and saw everybody and told them: "Gentlemen, this has got to cost; I am going to put up the last dollar that I possess in order that we should settle this case. I said, "Mr. Shapiro, I would like you to put up about \$5,000

into this compromise; as you have bought plenty of goods from the Illinois Distilling Company, according to my opinion you can afford to put it up. He asked Oscar—whoever it was—he had a man—and this man did not advise him to do it. He said, "You will

225 have plenty of time to put up \$5,000 before Judge Landis.

I called on Shapiro twelve different times; I actually cried for the man to come out with it; and he would say pretty near the same in every case, "I wouldn't object if this fellow Bionsky"—I really believe he would have come up to a compromise. He did not put up any money in compromise at that time; he put up some later; I heard that he put up money.

The COURT: Strike out what he heard.

Mr. PARKIN (examining):

The WITNESS: When I heard about the indictment I was in Boston; and then I went to Washington to try to see if I could get

out of the case. I came to Chicago after they told me in Washington that it has either got to be compromised, all or none; they wouldn't compromise with me personally. So I came here and after spending six weeks, I came up here to the District Attorney's office.

These checks which were made out to my wife and sent to Baltimore were for cash money and checks which I gave to Shapiro in exchange for these checks during the time; in my opinion the cash money and checks given to Shapiro, personal funds as distinguished from funds paid by Shapiro for brandy for these checks amounted to five or six hundred dollars; the balance was for brandy.

226 Cross-examination by Mr. McEWEN:

There were no books in the distilling plant, with the exception of the Government entry of the fruit and brandy and so forth. There were no accounts kept of goods purchased; every day it was figured up, and the balance was put on file. There was no memorandum of the amount sold. It wasn't carried in no mind at all; it was mostly cash transactions, all of the sales.

The way I arrive at the cost of this brandy is a bag of sugar averaged upward of \$2.50, up to \$3 a bag, and they produced ten gallons, sometimes nine gallons of 100 proof. The cost of the yeast—the yeast does not produce any brandy at all, it simply helps to ferment the sugar; then the additional cost of the fruit—it costs more to manufacture from raisins or prunes than from sugar, and we sold it for a low price. So we figured out that the cost was never less than 50 cents; sometimes it cost 60 cents a gallon 100 proof. 150 it would cost between 80 and 90 cents a gallon.

I wouldn't be able to state how much fruit I bought. All the fruit that was purchased, was entered on the Government records, and the records are right here; they would be able to tell you

227 more than I; I wouldn't remember how much. I never attended to that; I never bothered. The record of the sugar wasn't kept in the distillery at all; that wasn't entered at all; the Government simply got that from the Corn Products. I have looked into it since; I haven't looked into it too deep; but as far as I know, it figured up about pretty nearly a million pounds. The price of that sugar is between two and a half and two seventy-five—that was the sugar made from corn, of the Corn Product Refining Co. I wouldn't be able to state roughly how much I spent for fruit; I guess it was several thousand dollars, possible five thousand and maybe over. There may have been between five and ten thousand dollars of fruit bought; I wouldn't be able to state that; that is as close as I can state that. Besides the fruit and the sugar there was the yeast. The yeast cost about 13 to 15 cents a pound and there was used between 150 and 160 pounds in a tank; it all depended on how many tanks we used. I think it cost on an average during the whole operation between fifty to a hundred dollars a week for yeast. Then

228 there was coal. The coal amounted to between half a ton and a ton a day, as much as the deliveries were running; we used both soft and hard coal; if we used hard coal it cost

about \$6.50 or \$7; the other coal cost \$3, \$3.50 to \$4.50; we would average for coal \$5 a day. Then we paid out for a little tax-paid goods; there was paid for that about \$10,000 or \$12,000 during the whole operation. For rent \$50 a month. Then the cost of the salaries would be \$50—about \$80 a week, counting in salary for myself and Weiss and sometimes two or three other people around that used to wheel in the coal and so forth; that cost about \$10 a week. I can think of no other expenses.

When I went to the District Attorney's office, I went there voluntarily myself; I don't believe I told anybody I was going there, but I may have told it to Dave Shapiro; if I told him, he would have been the only one that I ever told.

On direct examination I said that the fruit was used for "covering," not "coloring," because all the brandies that is made with any alcohol is white; there is no color at all; any whiskey that is made is white; when you want to cover a tank of 2,000 gallons, it is pretty broad all round, and you have got to have at least a ton and a
229 half to cover it; if not, everything would come up.

I feel as friendly to Shapiro today as ever I was. I thought that he was preventing to some extent a settlement with the Government; but I absolutely did not feel no ill feeling toward Shapiro at that time; neither today. I have been perfectly friendly all the time.

Redirect examination by Mr. PARKIN:

When we started to operate on Saturday night we always used hard coal Saturday night and Sunday, so that nobody could see any smoke, that we were working by—to deceive the Government.

Q. You were asked about the rent that was paid there by that distillery. I show you what purports to be a lease. Will you look at that and state whether or not that is the lease of the distillery premises?

A. That is the lease which Mr. Frindel had.

Mr. PARKIN: I offer that lease in evidence.

Mr. ZOLINE: Objected to; we are not concerned about the distillery lease with which Mr. Shapiro had no part in renting.

The COURT: Objection overruled.

230 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Said lease was admitted in evidence and marked Government Exhibit A. It was made between John O'Malley, Jr., and Simon Frindel for the premises of 2733 and 2807 Quinn Street, Chicago, for a wine and brandy distillery for a period from August 15, 1908, to August 14th, 1913, at fifty dollars per month.

The WITNESS: As to the amount of sugar which was used at the distillery, I have not figured it up to the pound, but there was between nine hundred thousand to a million pounds.

Mr. McEWEN: If you have footed it, Mr. Parkin, we will not object to your footing, if you will read it.

Mr. PARKIN: I suppose if counsel, on Mr. Smith's statement, says

it is nine hundred and sixty thousand odd pounds of sugar—may that be agreed upon—we will correct it?

Mr. McEWEN: Yes, subject to the correction from the receipts if any question arises about it.

Mr. McEWEN (recross-examining):

The WITNESS: We operated that distillery in 1908; September, October, November, December, January, February and March, 1909; then we started in 1909 in August, September, October, November, December, January and February that I was here; and then I left—after I got paid for the entire plant from Frindel—
231 I did not want to stay any more in the business, and I lived down east two months before this distillery ever was seized. I do not know the date of the seizure of the distillery.

FRANK WEISS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. FREEMAN:

My name is Frank Weiss. I live at 700 158th street New York. I came to Chicago about 1908, the first time I was ever here; that was around August or September. I stayed here until 1910; we stayed here from 1908 until 1909, April, and then we came back in July, 1909, until February, 1910. My business during that time I was in Chicago was mechanical engineer—engineer for the Illinois Fruit Distilling Co., run by Mr. Simon Frindel. The distillery was operating from September, 1908, until April, 1909. And then
232 from July, 1909, to February, 1910. The distillery was in operation when I left Chicago. I was a licensed engineer in the city of Chicago. The distillery made brandy out of sugar.

I know the defendant in this case, David Shapiro. I have been in his place on Halsted street. The first time I came to Chicago I came with Bronstein; I met David S. Shapiro on the same evening when I arrived; it was in about August; I can't remember the date. During the first period that the distillery was running, I did some business with the defendant, David Shapiro. I sold him brandy. During this first period the distillery was in operation I visited his place of business more than a hundred occasions. I went to collect money there for the brandy.

Q. Can you state how much brandy the defendant, David Shapiro, bought of the Illinois Fruit Distilling Company during this first period?

Mr. McEWEN: I submit that this witness has not shown that he may have the knowledge in which he could make a computation; he did not make all the sales and all the deliveries.

A. About four or five barrels.

233 Mr. McEWEN: Objected to.

The COURT: If it appears on cross-examination that he has no knowledge, if you call for it, I will strike it out.

Mr. FREEMAN (examining):

The WITNESS: About three or four barrels or five barrels; the first time he took three or four barrels a week, and then he took five. I mean he took that number of barrels a week every week during the first period. I collected for that brandy. I collected the first year \$1.50 for 150 proof, and then we collected \$1.40 for 150 proof. The first bill he paid \$1.50; I can't tell exactly whether I collected \$1.40 during the first period. I came every week and collected, sometimes I collected, sometimes Bronstein collected and sometimes Frindel collected; he gave me a check—checks and cash. I began to collect from Mr. Shapiro in the first period about October, I guess. During the month of September I did not collect. This brandy for which I collected came from the distillery, from the condenser; it was drawn directly from the condensers and the barrels. It was not brandy that had been gauged and stamped by the Government gauger. The tax was not paid to the Government on that brandy.

234 Suppose there were three or four barrels in the distillery that was gauged from the gauger; Frindel went up to the Revenue office and took out three or four stamps that he had paid a tax on. He took them barrels and put the stamp on them and sent them over to Shapiro, and bring back the barrels and filled them again and sent them back again.

Q. Now did Shapiro buy any goods during that first period where the stamps were not brought back?

Mr. ZOLINE: That is objected to as a pure conclusion.

The COURT: He may answer if he knows.

To which ruling of the court the defendant by his counsel, then and there duly excepted.

A. Yes, about a barrel a week.

The first time he paid \$2 and then he paid \$1.80.

I had different talks with the defendant; I have been every week in his place. I have talked with him on the telephone; he was calling up to the distillery; I was in the distillery; these talks occurred when Bronstein was delivering the goods to him and the goods were emptied; he says "Everything is all right," Mr. Shapiro says. I

235 I know his voice when I hear it over the phone; he identified himself to me when he telephoned; when Max went away with the goods to Mr. Shapiro, and when he left there he telephoned; he says "This is Dovid." "Dovid" means David, in Jewish. He said "This is Dovid; everything is all right"; and on several occasions he called up to send him some more goods, and when Max came back with the barrels on these occasions, we refilled the barrels again and sent the goods.

Now in the second period, in July, 1909, I had a conversation in that month with Shapiro; I was there, Frindel was there and Bronstein was there. This conversation took place down in his store. He said that he did not want to pay any more than \$1.40

for the goods; first he tried to pay \$1.35 for a gallon 150 proof, and then he wouldn't pay any more he said than \$1.40, and all the goods he will take more than two or three barrels a week; that was the conversation. He said that he will pay \$1.40 and will take more than three or four barrels, and we shouldn't sell to no more

236 retailers; he will take more goods. During the second period he took about five or six barrels a week. A barrel holds about 50 gallons 100 proof. I collected on several occasions during the second period at the rate of \$1.40, 150 proof. Those payments were more in cash. Sometimes I came on Friday and he gave me a check, and he says I shouldn't deposit the check until Monday, and Monday he would give me the cash; he came Monday with me to the bank and drew the money and he gave me the money.

I had a bank account during the first period; I did not have one during the second period. During the first period I had an account at Kaspar's bank. I don't know if Mr. Frindel had a bank account in Kaspar's bank. Bronstein had a bank account during the second period in the West Side Bank.

Q. Now I show you a check, Government Exhibit 71, made out to Frank Weissman—who is Frank Weissman?

A. My name is Frank Weiss, but Mr. Shapiro he made it out to Weissman so there shouldn't be so many to Weiss; then lots of checks he took out in cash—afterwards he put it in cash. He said he will write it to cash, that I should not deposit them, I should come Monday and he will give me the cash. My name is Weiss, not Weissman. I did not write "Weissman" in that check; that was written in Mr. Shapiro's place of business, and is in his handwriting.

237 Q. What was this money used for in this bank account you had which you deposited?

A. Well they were put in checks and taken out cash, and I did not take out, Bronstein took out and Frindel lots of times took out; they used it for anything that Max wants to get, for sugar, for yeast, and so on—why he took the money out from the bank.

Q. Do you know whether that check (indicating) was deposited at all or whether it was merely taken in cash; can you state by looking at it?

A. Well I don't know much about checks, because I didn't belong much—the first time that I belonged in Kaspar's bank, Frindel took me in there; I did not know at that time what the check is; and Frindel took me into the bank in Kaspar's. He says "Put another name"; I says, "No, I will put my own name." He says, "I don't want your own name; put another name." I says "No," so I put my name on the back.

The COURT: Strike out what Frindel said.

The interest I had in the business was \$25 a week and five per cent. The bank account was my bank account, but it was from the distillery.

238 I remember the occasion of Mr. Weiss going to Mr. Shapiro's place of business in the second period after a telephone

call; it was in the evening about 5 o'clock. Max Bronstein rolled down four or five barrels of brandy from the distillery, and he telephoned to the distillery—Shapiro—that Max should not come with the goods because somebody was watching there in the front, and I took the car to overtake Max on the way; and when I came back to Mr. Shapiro's store, Mr. Shapiro was standing at the door, and Max had unloaded already; and I came in the store, and Mr. Shapiro says "Somebody said they are watching. Go ahead, see *So* who that man is, maybe you know him." I went outside on the corner and saw a man standing there, but I did not know the man; I came in back and said, "I don't know the man".

Most of the brandy was delivered to Shapiro on Saturday nights and Sunday mornings in the middle of the week; sometimes in the evening, Saturday evening or Sunday morning. The tax-paid goods were delivered in the daytime. Bronstein delivered most of the goods; I delivered once in the second period. I delivered about I

guess four barrels; I delivered in the evening, and it was
239 emptied and returned back, the barrels with the stamps. I brought the four barrels and I rolled them in the store in the back alley, and Shapiro saw them emptying the barrels; he took off the stamps and he gave me back the stamps, and I went back to the distillery with the barrels and filled them up again and placed the stamps again back on these barrels. The brandy was emptied in the tanks. It was put into the tanks through a pump, electric pump.

Mr. Shapiro took out of the distillery during the time I was connected with it altogether about 25,000 gallons; that was un-tax-paid.

The COURT: Strike it out.

That 20,000 to 25,000 gallons did not include the barrels that were delivered in the day time.

Cross-examination.

By Mr. McEWEN:

I have never been known by any other name than Frank Weiss; no one ever called me anything else. I am an engineer for a boiler and engine. I had an engine at the distillery; I ran an engine on the other side when I was 15 or 16 years old. I mean in Europe. I
240 came to this country 17 years ago. I have worked at different work since I came to America; varnish was one trade; I was peddling; I had a coal yard; I had my own coal yard in New York nine or ten years ago.

I met Bronstein in Baltimore, five years ago; Bronstein had a distillery in Baltimore; he worked before Frindel—worked for a couple of months; at the time I met Bronstein I sold the coal yard; then I moved from New York to Baltimore; I worked for Bronstein there; I did the same work—engineering work, ran an engine. I had no bank account at all; my first bank account was here in Kaspar's bank. I did not collect the bills. In Baltimore I just worked in the engine room. I knew about distilling liquors at that time; I knew something about running a distillery. I learned about a distillery in

Paterson, New Jersey, when Frindel had the distillery there; I worked at Frindel's distillery; that would be about eight years ago. That was before I ran the coal yard; afterwards I don't know what I done; I think I peddled at that time I was in the fruit business.

I did not learn anything about the Government stamps until I learned it here in Chicago. I did not know anything about beating the Government in Baltimore. As far as I could see, that distillery was honest.

241 They paid me \$25 a week in Baltimore for my work. I talked with Frindel about coming to Chicago; Frindel got me to come. Frindel was the owner of the distillery at that time in Baltimore, and Frindel came to Chicago first. Frindel was my boss. Bronstein came there; he did not work around there at Frindel's distillery in Baltimore. Frindel came to Chicago first. At the time he came, I did not know that I was going to come too.

I didn't arrange to come to Chicago until the last time—when Frindel came from Chicago once; he was once in Chicago—then he came once from Chicago—he sent me a telegram that I shall meet him at Mount Royal station in Baltimore. And he took out two stamps from his pocket, and he showed me, and he said: "Chicago is a good town; you can do business there"; and he got two stamps back from the Hudson Distillery Company.

Those were the first crooked stamps I ever saw. He told me that Chicago is a good town, and he has got customers there where he can dispose of the goods.

Q. What did you understand when he showed you the stamps—that he was going to Chicago for honest business?

A. I did not understand anything; I don't know; he Max
242 was to go down for the disposing of the goods. And he showed me those two Hudson stamps; they had been on barrels; they were old stamps; I saw they had been used. He told me himself. At that time I knew enough about stamps and knew that stamps have to be cancelled when they have been used once. I did not ask him at that time what part of the business I was going to have in Chicago; I didn't know whether business was good in Chicago or not when he told me that, but I went with him. I was to get \$25 a week and five per cent interest; I understood I was getting that for being an engineer, running the engine and keeping up the steam. The five per cent was made up here afterwards, in Chicago. The five per cent started—it commenced after I started to work here, as an engineer. For the five per cent I was to do everything. I was working for the salary, worked in the store, going out. We arranged for the \$25 a week down in Baltimore; and it was afterwards when we arranged for the five per cent profits. I was doing everything in the distillery that it was necessary to do. When I was in Baltimore

I got \$25 a week; that was for running the engine, and nothing else.

243 Q. What were you to do for that five per cent?

A. Well everything in the distillery that is supposed to be done.

Q. Were you to do some crooked work on the stamps?

A. Yes, I done it; I done everything.

Q. When Frindel said he would give you five per cent of the net profits, did you understand that you were to do some crooked work with the stamps?

A. I did not do crooked work with the stamps; I went for collection.

Q. You never had anything to do with the crooked work?

A. No.

Q. You knew it was going on?

A. Not with the stamps, because I did not handle the goods; I never brought back the barrels only on one occasion I brought Shapiro four barrels; that was all of my work. I never handled the stamps. I never took the stamps off of the barrels; I was always inside.

Q. And your bargain for five per cent didn't have anything to do with crooked work?

A. I went for collections too; I always was inside. I collected, Max collected, Frindel collected—we all of us collected. I collected, but I wouldn't say all of it, but most of it.

When I made a collection and they gave me a check, in the first period, I put it in Kaspar's bank, and they drew it out cash. Frindel took me to Kaspar's bank, and he told me I was opening a bank account not under my name, but a different name. All the money was his, Frindel's. He had an account there; he had this money that was in my name. He did not have an account there in the name of himself or the Fruit Distillery Co. I don't know whether he had an account there in anyone else's name.

These moneys that I collected for the distillery from Shapiro, I deposited the money in Kaspar's bank, and Max deposited. Frindel kept track of the moneys that I collected from Shapiro. He had the bank book and the check book; I did not at that time even know how to make out a check; I did not know anything about checks.

Q. Did Frindel put down what you put in?

A. Sure. I don't know how many books he had. He had a bank book and a check book. He did not have any other books. I only collected from Shapiro; I did not collect from nobody else; maybe once. They never sent me anywhere else to collect. If I remember, I collected once in South Chicago, at Levin-kind'; I took over there three or four barrels of goods. I delivered myself once, with a team; and I collected right on the spot; we always got cash. I did not deliver nowhere else except once. I collected once or twice in Blume's and once or twice in Mendelssohn's, that is all.

Frindel kept these bank books. Most of the days they deposited because I was inside; when I came with the check, I handed the check to them at the distillery, and he deposited. I made four or five deposits maybe at Kaspar's bank, that is all. I signed the checks; Frindel made them out; I can write in English, but not much. I cannot spell it enough to make out a check.

Q. How many checks did you make out?

A. I don't recollect; maybe a dozen; I signed all winter the first

period; I can't say how many I signed. I did not keep a
 246 record of how much money was in the bank there, because
 Frindel had the book, he kept the account; he did not have
 no bookkeeper. I don't know how much money went through that
 account; there was more than a thousand, about seven or eight thou-
 sand dollars. I wouldn't say \$25,000 had gone through that bank;
 I don't think \$25,000 could have gone through that account.

The COURT:

Q. Were you the only man that made any deposits in the Kaspar
 bank?

A. They were not deposited in Kaspar's bank—I deposited—that
 goes into my name in the first period.

Mr. McEWEN:

Q. Did anybody else put any money in there besides yourself?

A. Yes, sure, Bronstein and Frindel—most of them put it in.
 But I signed every check. Frindel did not sign any, as it was in my
 name.

I think Frindel had an account in his own name, or the name of
 the Illinois Fruit Distilling Co. in the West Side Trust and Savings
 Bank. I never saw any checks of that bank.

My salary was paid by checks. Sometimes I signed my own
 checks and sometimes I collected. I took out my own salary. I had
 a right to take out my own salary.

247 I got about \$50 a week on the five per cent; I got it every
 week and every two weeks. I was there in all 45 weeks I
 guess. I was there all the time the distillery was running; I was
 there the first time and the last time. In the first period the dis-
 tillery ran September, October, November, December, January, Feb-
 ruary and March—to the 15th or 20th of April I think during the
 first period.

I only made a delivery to Shapiro that one time; and that was in
 the second period. I have been in his place of business every week,
 but I did not look over his stock.

Q. Outside of that single delivery, you cannot say, of your own
 knowledge, that any liquors were ever delivered there by that dis-
 tillery?

A. Sure I can tell; nobody told me, but I filled up the barrels
 myself, and then I done the collections. I know it went to Shapiro
 because I was called up every time, and then I had the collections—
 every week I collected. It is hard to say how much money in all I
 collected from Shapiro; I collected about \$15,000 anyhow.

248 I also know that Bronstein collected and Frindel collected;
 I don't know how much they collected.

I never saw any of his books of Shapiro's account.

Q. Did you not put on any of these crooked stamps on to the bar-
 rels?

A. I might have put it on a couple of times; most of the time Frin-

del and Max were putting them on. I am sure I did put them on a couple of times—two or three times.

When I quit the business here, I left the distillery running; that was in February, 1910, I guess, in January or February, I don't recollect; the distillery ran a month or so after I quit. Frindel settled up, he paid me; the last when he made the final settlement, he was owing me \$100 or \$150. Bronstein and I settled up together with him; we both quit at the same time, and both were paid off at the same time—I don't remember if he paid him off either; I know he paid me \$130 or \$135.

I knew some of the revenue officers, inspectors and Government gaugers at that time. I knew that the Government had taken a sample of the mash out of the vats.

249 Q. Shortly before you left?

A. I saw them take the sample.

Q. You knew enough of distilling to know that if the Government made an analysis of those samples, the Government would find out that you were using sugar?

A. I don't know if they find it out or not. I seen what they took, but I don't know for what purpose; I didn't have any idea. I did not know that the Government, through their chemist, could find out what was in the stuff that was in the mash. I don't remember if I told Bronstein about their taking of the mash samples; I did not talk it over with Bronstein.

Q. Did Bronstein tell you that if the Government had got samples of the mash they would very soon find out that you were using sugar?

A. I don't recollect if I had any conversation with Bronstein.

Q. Did you know that the use of sugar in a fruit distillery was against the law?

A. Sure.

Q. Where did you find that out?

A. Because I know it.

Q. You knew it back in Baltimore?

250 A. I knew it from here. It was sugar mash that the Government inspectors and gaugers took; we did not have any fruit except fruit just to cover up, that is all; and I knew all the time that I was there that that was the way they made that brandy; I had been there all the time. Frindel did that the same way down in Baltimore, with sugar. I knew that in Baltimore. I cannot recollect the month that the officers took the samples, but it was the second period; it was in the fall. Max and I went back east together, took the same train back.

Q. You were pretty scared, weren't you?

A. I ain't been scared at all, no, sir.

Q. You aren't scared now?

A. No, sir.

Q. You are not afraid a bit?

A. No, sir.

Q. And you have not been afraid of anything? You have not done anything?

A. Certainly I did not.

Q. You are perfectly innocent?

A. What do you mean by "wrong"?

Q. That is something that you never heard of. Do you know what "right" is?

A. I know what "right" is—sure.

Q. Well do you know what "right" is not?

A. Yes, sure I know.

Q. When did you find out that the Government was going to get after you?

A. I did not find it out at all.

251 Q. Well, you found out some time that the Government was after you, didn't you?

A. No, sir.

Q. You don't know it now?

A. No, sir.

Q. Were you ever arrested?

A. No, sir, never.

Q. Did the Government ever send for you?

A. No, sir. Afterwards I came out west, after they seized the distillery; I came here myself; they did not bring me. I knew that they wanted me. They notified us down in Baltimore. When I got here I went to my lawyer, Mr. Sissman is the lawyer; he found out that I needed bail and we furnished the bail. I was under bail.

Then I was maybe once or twice in Shapiro's—you see everything was discovered—and I and Max was in Shapiro's once or twice, and we told him everything about that; we tried to settle with the Government, and Mr. Shapiro said the first time that there would be time to settle with the Government when he will be in Judge Landis's bench—chair—the witness room. Bronstein told him that he should put up money, and they all should put up money, and they could settle with the Government. I don't know how much money

252 he said they should put up—but they should all put up money—the other liquor dealers wanted to settle, but Mr. Shapiro did not let them do it.

Q. So Shapiro was the man that seemed to have stopped the settlement?

A. Yes.

Q. That is what you thought—that is what you understood?

A. Yes. Mr. Shapiro told me he has got time to settle when he is to be on Judge Landis's witness-stand.

Q. You looked upon Mr. Shapiro as the man who busted up the settlement?

A. I did not talk; Max had the talk with him. For my part I was to put up a thousand dollars; and Bronstein was to put up for his part \$750.

Q. Did you hear Bronstein tell Shapiro that if he would not put up some money, he would go over to the District Attorney's office?

A. No, sir; he didn't say that. And I did not say it at all. I was not angry with Shapiro for not helping the settlement, and I have

never been angry with Mr. Shapiro at all. I feel perfectly good to him at all times.

Q. But right after that you went over to the District Attorney's office?

A. We went up the first time—we seen that everything is discovered; we went into Col. Ingraham's office and we told him everything; he says "Go ahead to the District Attorney and tell everything you know." We went up there and we discovered everything that was going along for the two years. I don't recollect if that was before we went to Shapiro's when we went to Col. Ingraham. I haven't any idea at all whether it was before or after. I hoped we could get a settlement.

Q. And you knew if you made that statement that you would be out of trouble?

A. I did not know anything but we put the money up—and they objected. We went down there because we seen we are in trouble, every-hing is open: they found out the sugar, they found out the yeast and they found out how much goods we were making and they found out everything; we told our story to the district attorney because we were in trouble; they had discovered everything.

Q. Did you think you were going to get out of trouble by telling the district attorney?

A. No, sir; I didn't think at all.

254 Q. Did you think you were going to get any advantage or any benefit?

A. No, sir.

Q. Did you think that you had done anything wrong or criminal or against the law?

A. Well, I done it because I was in it; I was working there.

Q. Did you think that the Government would do anything to you by the way of fining you or putting you in prison?

A. Well, that is up to the court.

Q. Did you think so at that time?

A. I didn't think anything; everything was discovered. I wasn't frightened at all; we seen that everything is discovered and we came and told everything.

Q. And you think you will get out of it?

A. No, sir, I didn't think.

Q. What do you think now?

A. I don't think it.

Q. You don't allow yourself to think?

A. No.

We went to the District Attorney's office several times; I have told them my story once, and that is all since we started. I have talked with them since, but have not talked over that matter. I

255 have not talked to Mr. Freeman about my testimony, nothing at all. I talked to him the first time I went to the district attorney's office. I have not talked to anyone else.

Bronstein and I have not talked together away from the district attorney's office about this case. I only talked it over with Mr. Freeman that once and have not talked it over with anybody else.

I testified once before Judge Landis. I went before the Grand Jury; I think I was there only once. I was only once in Judge Landis's court—I was for several days. I testified there only once. There were several cases. I testified in Frindel's case and in Levenkind's case. I have testified in five or six cases.

I did not go to the other liquor dealers about settlement; I don't know if Max went or not; I only went to Shapiro's. I did not go to any other city; I did not go to Connecticut nor Baltimore to see liquor dealers.

There were shipments from this distillery here to other towns and other places. Those shipments were made to St. Louis, Brooklyn, New York—I don't know if it is Minneapolis. There were shipments to Connecticut and Baltimore; we did not ship to
256 any town in Ohio. I know the names of a couple of the people to whom we shipped; I don't know how much was shipped to these men.

In that distillery there were made 100 and 150 proof liquors; the first period we did not make any 100 at all, we made all 150. In the second period I cannot tell exactly how much we made 90 per cent, 100 or 10 per cent or 100. We did not make much 100; we did not have no 100 proof at all in the first period. In the second period we made a little 100, not much.

I was in the place of business every day and in and around the vats; I saw everything that was going on; and saw the distillation; I knew when we were trying to make 100 proof and when we were trying to make 150 proof.

Q. Who had the actual charge of distilling and who put the sugar in, and put in the hops and put in the water?

A. All of them, all of us. Mr. Frindel was in front of them, on top of the vats; of course he wouldn't carry them up; he
257 wouldn't carry the sugar up; he was on top of the vats and with a knife and cutting it off, and we were carrying the sugar up. We had two more men helping us. They were doing just the same as we done, carrying out the sugar and fermented yeast.

When we made the 100 proof we just put a little water in it and reduced it to 100, that is all, reduced from 150 to 100.

Q. Well who would decide what you would do; who would say "Now we will make some 100 proof?"

A. We did not have to make it; it was always 100 proof in the filter; if a liquor dealer wanted 100 proof why he telephoned over; we made it just as we got orders for it—10 per cent, 100, 90 per cent, 150. If we got a telephone for 100 proof, it was made already; it took too long to make it up—it was made already, always; nobody looked to the making of that 100 proof; it was always in the tank; just put the water in, to ten gallons of whiskey 150, put five gallons of water, and that makes 100 proof. I done it myself and Frindel did it. Frindel bought the stamps. And I went to the Revenue office for stamps.

Bronstein and I came to Chicago together; we went to
258 Shapiro's place of business that evening; Bronstein had been out here once before with Frindel, three or four weeks

before I guess. When we went over to call on Shapiro Frindel knew Shapiro; it was Bronstein that introduced me to Shapiro; I suppose Frindel introduced Bronstein; we did not have much talk that evening; just asked him where we can go to sleep that night, and we were sent by him to the Jackson hotel.

I don't know how large the deliveries of liquors and brandies to the other dealers around Chicago were because I did not collect, and I can't tell exactly. And I did not know around the factory—around the distillery how much was going out to those places. By the week we did not ship much liquor out of the city, nor by the month. We shipped it out in kegs and jugs. The kegs did not have to be stamped; anything that is under five gallons don't have to be. I don't think we shipped any barrels at all; my best recollection is that we shipped no barrels, but shipped kegs and jugs.

Q. Do you know what days in the week deliveries were made to Shapiro?

259 A. Well, on the first period, I can't tell the date, but the middle of the week, for a month or two; and then the most deliveries were Saturday night and Sunday morning and Sunday evening; in the first period and the second period. To the other dealers we delivered in the day-time. Shapiro's was the only place we delivered at night, because it was delivered in a barrel; the others were delivered in jugs, except South Chicago was taking barrels. On one occasion, I guess in the first period, we sent Shapiro some jugs of 100 proof, probably 40 or 50 gallons, one delivery in jugs. Shapiro was the only man that took delivery on Saturday nights and Sunday mornings—no, South Chicago took on Sunday too and Blume took on Sunday too; I don't think there was anybody else. There were three or four barrels went to South Chicago. We delivered down there once in a week, in the second period; we did not always deliver on Sunday to South Chicago—sometimes. We delivered to Blume on Sundays sometimes a barrel or jugs, sometimes on Sunday a barrel. I did not deliver every Sunday to Blume's—sometimes delivering a barrel and sometimes delivered a couple of jugs.

260 Q. I will ask you to look at these several documents, which I show you, produced from the possession of the Government, No. 72, 73, 77, 79, 78 and 74, and say if that is your signature on them?

A. No, sir; that is my name; it is not my signature (referring to exhibit 73) I did not write it.

The COURT:

Q. Just select those that your signature is on?

A. That is one (referring to Government Exhibit 79) and that is one (Government Exhibit 78).

I know about the cost of manufacture of brandy, and how much it cost to manufacture it down here in this Illinois Fruit Distilling Co. It cost about 60 cents 100 proof, and 90 cents 150 proof. It costs more to make brandy from fruit than from sugar.

Redirect examination.

By Mr. FREEMAN:

To manufacture brandy from fruit would cost about 70 cents, 100 proof.

261 I had been away about four weeks from the distillery when I heard that I was indicted. I heard that there was trouble here in Chicago about the distillery here. I was not arrested down east. When I heard there was trouble here, we came right here; after we came here went up to Mr. Sissman, and we gave bond.

The highest I collected from David Shapiro for 150 proof is \$1.40; for the stamp-paid goods, the highest amount he paid for these, was \$1.80. The distillery was running I guess five or six weeks when I began collecting from Shapiro—about two months. Bronstein and Frindel had been collecting before this time. When I speak of \$1.40 and \$1.80 tax paid, that is for 150 proof.

I learned about the cost of manufacturing brandy from fruit and from sugar when I was working for Frindel, in Paterson, New Jersey; that is the first time I went into a distillery; I worked for him four weeks, and after four weeks I left him; I wouldn't work there. The name of the distillery in Paterson, New Jersey, was the American Fruit Distilling Co. He used sugar there.

I learned the cost of making fruit brandy here. We made some here; when I went to Paterson, New Jersey, I learned it from 262 Frindel's. I worked there about eight years ago; then I went in the fruit business, and after that had a coal yard, and then I went to Baltimore.

Whereupon a recess was taken until 2 o'clock p. m. Tuesday, October 14, A. D. 1912.

263 JOHN MULLEN, a witness on behalf of the Government, was sworn and testified as follows:

Direct examination.

By Mr. PARKIN:

My name is John Mullen, I live in Baltimore and have lived there all my life. Chicago is not my home, I have worked here, stayed here temporarily, in 1909, I think, working in a distillery on Quinn Street, I think the name was Illinois Fruit Distillery. I was doing laborer work of all kinds, driving a wagon once in a while and working around the place. I am not a distiller.

I have made deliveries of the product of that distillery; have made deliveries to the place of business of David Shapiro. I was there once, at that time I had two or three barrels of brandy on my wagon. That was in 1909, I do not know whether it was winter or summer. Nobody was with me at that time. I had two or three barrels, which had brandy in them, which I got at the distillery. When I delivered the barrels they had stamps on them, revenue, United States Revenue Stamps. I took the barrels away from the defendant's place of busi-

ness, emptied them right away. When I took them away the
 264 stamps were off. Some young fellow they called Jake in
 there had taken them off and gave them to me to take back
 to the distillery, which I did.

I often went there at other times with Max Bronstein, who testified
 here. The occasion of my going with Bronstein was, he said he was
 feeling bad, and he wanted me to go help him unload, which I did.
 At those times I had barrels of some kind of brandy on my wagon,
 and there were stamps on the barrels. I unloaded at Shapiro's place
 of business. The stamps were taken off and Mr. Bronstein took
 them, I did not take them. I am not under indictment or charged
 with any crime. I was simply a laborer out there, that is all. I made
 fifteen dollars a week. To empty the barrels over there at Shapiro's
 they had an electric machine, and had a piece of pipe put down into
 the bunghole of the barrel, and pumped it out into tanks.

Cross-examination by Mr. McEWEN:

I never saw David Shapiro there at any time. I had worked in
 Baltimore in a distillery, as a laborer, at fifteen dollars a week. I
 did not do any skilled work there, I did what any man can do with
 his hands, arms and feet, any able-bodied man.

I knew that they made the brandy out of sugar in Chicago.
 265 When I worked for Frindel in Baltimore they used sugar,
 and fruit too. I did not know that the use of sugar in a fruit
 brandy distillery was against the law. I do not know why I was
 brought to Chicago to work—to make a living. I had a family in
 Baltimore, and they were there all the time while I was here. I paid
 my own railroad fare to Chicago out of my own pocket. While in
 Chicago I worked sometimes on Sundays, I could not say how often.

Stipulated by counsel that a certain waybill heretofore offered and
 withdrawn be put in evidence without further proof; the same is
 marked Government's Exhibit 1-B.

Said waybill shows a shipment from Baltimore over the Union
 Line, name of the shipper being Simon Frindel, to himself to Chi-
 cago, Illinois, the articles shipped being distilling machinery and
 the date of the shipment is August 8, 1908.

266 Whereupon the defendant by his counsel moved the court
 to direct the jury to find the defendant not guilty on the
 fourth, ninth and twelfth counts; which motion was denied, and the
 defendant excepted.

Thereupon the following proceedings were had in the presence of
 the jury:

It is stipulated that the Bank's statements may be admitted in
 evidence without objection to the form of the proof.

Said Bank statements tend to show the various amounts deposited
 in the name of Rosa Brownstein from June, 1909 to March, 1910,
 to the amount of \$22,329.25; Illinois Fruit Distilling Co. between
 August, 1908, to February, 1910, in the sum of \$11,312.79; Frank
 Weiss, in the sum of \$11,580.60.

267 *Extract from Closing Argument of Mr. Parkin.*

Now who was present, according to the testimony of the witnesses, when this thing transpired? Well, the defendant was there; Ben Shapiro, his brother, was there; Jake Shapiro, his son, the young man who sits over there (indicating), and has attended this trial every day; and Bionski, the bookkeeper, was there. Now if their witnesses have not lied about it—if they told a damnable, cursed lie, why, in God's name, didn't they produce Jake Shapiro, who has been around the hall this past six weeks listening to the trial? Why didn't they produce on the witness-stand Bionski, the bookkeeper, who was there, according to the testimony of our witnesses? Why didn't they produce Ben Shapiro, the brother of the defendant, when they delivered these stamps?

If we lied—whether they make us out good liars or not—it is an easy thing, and it would take but five minutes to put those witnesses on the stand and show conclusively, beyond all peradventure
268 of any doubt and beyond all moral certainty that Bronstein, Weiss, Smith and all the rest of them were the most damnable liars who ever took oath as witnesses in the witness chair. Did they do it? Did they produce the witnesses?

This case has been on trial since last Thursday morning—Thursday, Friday, Saturday, Sunday, Monday, Tuesday, Wednesday—seven days you have come in here and sat in your chairs and, under your oaths as jurors, you have listened to people in that chair, and not one word has come from the mouth of a witness who was present, as we testified saw these things.

What is the inference? What is the conclusion in the minds of reasonable jurors? How easy it would be. We say, that those two stamps which the witness has testified the defendant took out of his pocket and gave to Frindel—

Mr. ZOLINE: Now, if the court please, we except to the remark of counsel as to the inference because the defendant did not take the stand.

Mr. PARKIN: No such suggestion of that kind.

The COURT: He made no such inference; as I understood counsel it was the failure of somebody to produce witnesses other
269 than the defendant.

Mr. PARKIN: The defendant don't have to take the stand, Gentlemen of the jury; and no inference of any kind can or will be suggested by me to be made. But where is Bionski, the bookkeeper? Where is Ben Shapiro, the brother, and where is Jake Shapiro, who were present when the stamps were removed and the barrels rolled out and the heads put down in the wagon and taken back to the distillery? That is my question and nothing else.

Mr. ZOLINE: You could call Jake Shapiro and put him on the stand; it is not fair to make that remark.

Mr. PARKIN: I move that remark be stricken from the record.

The COURT: It does not appear of record; it is not up to the pres-

ent time in the case, Mr. Zoline. It is not in the record unless your stating it here now—puts it in the record.

Mr. McEWEN: I think then the remark of Mr. Parkin should go out that Mr. Shapiro was sitting in the court room. That is testimony from him.

The COURT: Yes, that may be stricken out.

270 And afterwards, to wit, on the 17th day of October, A. D. 1912, the jury returned the following verdict,
 “We, the jury, find the defendant, David Shapiro, guilty as charged in the indictment.”

And afterwards, to wit, on the 17th day of October, A. D. 1912, immediately after the return of said verdict Messrs. Elijah N. Zoline, Patrick H. O'Donnell and Willard M. McEwen, on behalf of the defendant, David Shapiro, made a motion that the court set aside the verdict of the jury and grant the said David Shapiro a new trial. And thereupon the court set the third day of November, 1912, as the day upon which the hearing on said motion for a new trial would be held. And afterwards, to wit, on the said 3rd day of November, 1912, the court overruled the motion of the defendant for a new trial herein, to which ruling of the court overruling the motion of the defendant for a new trial, the defendant then and there duly accepted.

And afterwards, to wit, on the 9th day of November, 1912, the Court overruled the motion of the defendant in arrest of judgment, to which ruling of the court, overruling the motion of the defendant in arrest of judgment, the defendant then and there duly excepted. And thereupon the court entered judgment upon the said verdict and sentenced the defendant to be confined in the penitentiary at Fort Leavenworth, Kansas, for the period of two (2) Years and to pay a fine of Five Thousand Dollars (\$5,000.00), to which judgment and sentence of the court, the defendant then and there duly excepted.

271 For as much as the said evidence and said several proceedings and matters of exception do not appear of record in said cause, this bill of exceptions is presented to the court by the defendant, David Shapiro, with a prayer that the same may be signed and sealed by the court herewith, which is done accordingly this 4th day of January, A. D. 1913.

GEORGE A. CARPENTER, *Judge*. [L. s.]

Presented to me this — day of November, A. D. 1912.

— — —, *Judge*.

Endorsed: Filed January 4, 1913. T. C. MacMillan.

272 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in Case No. 4451—wherein United States of America is Plaintiff and David Shapiro is Defendant, prepared in accordance with præcipe attached hereto, as same appears from the records and files in said cause now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office at Chicago, in said District, this 7th day of January, A. D. 1913.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
*Clerk of the District Court of the United States
for the Northern District of Illinois.*

273 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and sentence of a case which is in the District Court before you, or some of you, between United States of America, plaintiff, and David Shapiro, defendant, a manifest error hath happened, to the great damage of the said David Shapiro, defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment and sentence be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable *George E. White*, Chief Justice of the United States the 9th day of November A. D. 1912.

T. C. MACMILLAN,
*Clerk of the District Court of the United States
for the Northern District of Illinois.*

Allowed by
GEORGE A. CARPENTER, *Judge.*

274 NORTHERN DISTRICT OF ILLINOIS, ss:

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 7th day of January, A. D. 1912.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
*Clerk of the District Court of the United States
for the Northern District of Illinois.*

275 [Endorsed:] Gen. No. —. Term No. —. In the — Court. United States vs. David Shapiro. Writ of Error. Elijah N. Zoline, Attorney and Counselor. 1202 Fort Dearborn Bldg., Telephone Randolph 1183, Chicago.

276 UNITED STATES OF AMERICA, ss:

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing a writ of error filed in the Clerk's Office at the United States District Court for the Northern District of Illinois, wherein David Shapiro was defendant and is now plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and sentence rendered against the said David Shapiro as in the said order mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George A. Carpenter, Judge of the United States District Court for the Northern District of Illinois, this 9th day of November, in the year of our Lord one thousand nine hundred and twelve.

GEO. A. CARPENTER, *Judge.*

Service of the above citation and receipt of a copy thereof is hereby acknowledged this 9 day of November A. D. 1912.

Attorney for United States.

277 UNITED STATES OF AMERICA,
*Northern District of Illinois,
Eastern Division, ss:*

John K. Lenox, Jr., being duly sworn deposes and says that he served the citation herewith attached upon James H. Wilkerson, United States District Attorney for the Northern District of Illinois, Eastern Division, by leaving a copy thereof with Llewellyn Smith, a clerk who was then and there in charge of the office of the said James H. Wilkerson, dated this ninth day of November, 1912.

JOHN K. LENOX, JR.

Subscribed and sworn to before me this ninth day of November, 1912.

[Seal of Morris K. Levinson, Notary Public, Cook County, Ill.]

MORRIS K. LEVINSON,
Notary Public.

278 [Endorsed:] Gen. No. —. Term No. —. In the — Court. United States vs. David Shapiro. Citation. Elijah N. Zoline, Attorney and Counselor, 1202 Fort Dearborn Bldg., Telephone Randolph 1183, Chicago.

279 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 4451.

UNITED STATES
vs.
DAVID SHAPIRO.

The Clerk of the District Court of the United States for the Northern District of Illinois, will please prepare a transcript of the record, as follows, for use in the Supreme Court of the United States, in the above entitled cause:

Placita.

Order of June 21, 1910, to file Indictment.

Indictment.

Order of June 24, 1910.

Order of June 29, 1910.

Order of Sep. 22, 1910.

Order of Dec. 5, 1910.

Order of Dec. 17, 1910.

Order of December 19, 1910.

Order of December 22, 1910.

Order of December 23, 1910.

Order of Jan. 3, 1911.

Order of Jan. 17, 1911.

Order of Jan. 20, 1911.

Order of Jan. 20, 1911.

Order of Jan. 23, 1911.

Order of Feb. 15, 1912.

Motion for Change of Venue.

Mandate.

Bill of Exceptions.

Order of March 14, 1912.

Order of March 15, 1912.

Plea of Former Jeopardy.

Plea of Former Jeopardy.

280 Plea of Former Jeopardy.
 Demurrer to Plea.
 Order of May 10, 1912.
 Order of May 10, 1912.
 Order of June 11, 1912.
 Bill of Exceptions.
 Order of June 17, 1912.
 Demurrer to Plea.
 Demurrer to Plea.
 Order of June 17, 1912.
 Order of October 16, 1912.
 Order of October 17, 1912.
 Petition for Writ of Error.
 Assignment of Errors.
 Bond.
 Order of November 9, 1912.
 Order of November 9, 1912.
 Order of November 9, 1912.
 Order of December 5, 1912.
 Order of December 5, 1912.
 Order of January 4, 1912.
 Bill of Exceptions.
 Writ of Error.
 Citation.

 DAVID SHAPIRO,
By ELLJAH N. ZOLINE,
 His Attorney.

Endorsed on cover: File No. 23,495. N. Illinois D. C. U. S. Term
No. 93. David Shapiro, plaintiff in error, vs. The United States of
America. Filed January 9, 1913. File No. 23,495.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID SHAPIRO, PLAINTIFF IN ERROR,	} No. 93.
v.	
THE UNITED STATES.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.*

**SUGGESTION OF DIMINUTION OF THE RECORD AND
MOTION FOR WRITS OF CERTIORARI.**

The Solicitor General, on behalf of the United States, suggests the diminution of the record and moves the court for writs of certiorari in the above-entitled cause.

IMPORTANT MATTER NOT INCLUDED IN THE RECORD.

Certain documents and records absolutely essential to the proper understanding and decision of this cause have been omitted from the record filed in this court, the same being as follows:

1. Petition for writ of error and assignment of errors, filed February 3, 1911, in Circuit Court of Appeals. (Appendix "A.")

2. Writ of error from Circuit Court of Appeals, upon an order dated February 3, 1911, filed February 6, 1911, in District Court. (Appendix "B.")
3. Opinion of Circuit Court of Appeals, filed January 2, 1912. (Appendix "C.")
4. Motion to correct record and amend judgment, filed March 15, 1912, in District Court. (Appendix "D.")
5. Petition to release mandate, filed March 16, 1912, in Circuit Court of Appeals. (Appendix "E.")
6. Affidavits in aid of above petition, filed March 28, 1912, in Circuit Court of Appeals. (Appendix "F.")
7. Transcript of proceedings *in re* sentencing of defendant, filed April 12, 1912, in Circuit Court of Appeals. (Appendix "G.")
8. Affidavits in opposition to above petition, filed April 12, 1912. (Appendix "H.")
9. Affidavit in reply to above "affidavits in opposition," filed April 18, 1912. (Appendix "I.")
10. Extracts from brief in support of petition, filed April 19, 1912, in Circuit Court of Appeals. (Appendix "J.")
11. Order denying petition, entered April 24, 1912, by Circuit Court of Appeals. (Appendix "K.")

The significance of these omissions appears from the following history of the case, disclosed, except

for the matters indicated as omitted, by the record filed.

An indictment was returned in June, 1910, against Shapiro, to which he pleaded not guilty. This plea, by leave of court, was subsequently withdrawn. Shapiro then interposed a plea of *nolo contendere*, and on January 23, 1911, judgment was entered and sentence of imprisonment was pronounced upon him.

On February 3, 1911, a petition for writ of error and an assignment of errors was filed in the Circuit Court of Appeals (omitted item No. 1, *supra*; Appendix "A," p. 15), and a writ of error was sued out therefrom upon an order dated February 3, 1911, and filed in the District Court on February 6, 1911 (omitted item No. 2, *supra*; Appendix "B," p. 18). The Court of Appeals, holding that the record failed to show that the plea of *nolo contendere* had been accepted, remanded the case—

with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed further in conformity with law. (196 Fed. 268, 269). [Omitted item No. 3, *supra*; Appendix "C," p. 21.]

The opinion of the Circuit Court of Appeals delivered in connection with the issuance of the said mandate, dated January 2, 1912, adopting as a part thereof the decision by the same court, of the same date, in the case of *Tucker v. The United States* (196 Fed. 260), constituted, together with

the mandate, the basis upon which all further proceedings in the case were had before the District Court.

On February 15, 1912, further proceedings being had in the District Court under the mandate, the plea of *nolo contendere* was rejected, and, Shapiro then standing mute, a plea of not guilty was entered for him by the court.

On March 15 and May 10, 1912, Shapiro filed pleas of former jeopardy, demurrers to which were sustained. The sustaining of these demurrers constitutes the chief assignment of error before this court.

On March 15, 1912, a motion was filed by Shapiro in the District Court asking that the recitals in its judgment entered January 23, 1911, be amended to show that the plea of *nolo contendere* had been accepted. (Omitted item No. 4, *supra*; Appendix "D," p. 41.)

On March 16, 1912, Shapiro filed in the Circuit Court of Appeals a petition to release its mandate, so as to enable the District Court to alter its previous judgment. (Omitted item No. 5, *supra*; Appendix "E," p. 44.)

On March 28, 1912, Shapiro filed in the Circuit Court of Appeals three affidavits tending to establish the acceptance of the said plea of *nolo contendere* (omitted item No. 6, *supra*; Appendix "F," p. 49), and on April 12, 1912, he also filed therein a full transcript of all court proceedings

connected with the sentencing of Shapiro. (Omitted item No. 7, *supra*; Appendix "G," p. 57.)

On April 12, 1912, the Government filed three affidavits tending to show that the said plea had not been accepted. (Omitted item No. 8, *supra*; Appendix "H," p. 166.)

On April 18, 1912, Shapiro filed an affidavit in reply (omitted item No. 9, *supra*; Appendix "I," p. 176), and the next day filed a brief in support of his petition to release the mandate. (Omitted item No. 10, *supra*; material portions in Appendix "J," p. 179.)

On April 24, 1912, the said court denied the said petition. (Omitted item No. 11, *supra*; Appendix "K," p. 181.)

As indicated above, copies of omitted items Nos. 1 to 9, and No. 11, and of material portions of omitted item No. 10, are printed as Appendices hereto.

OMITTED MATTER SHOULD BE INCLUDED IN THE RECORD.

The omissions are not due to the fault or laches of the defendant in error.

The transcript of record in this case was prepared in accordance with a praecipe made and filed by the plaintiff in error. Neither was the defendant in error consulted nor were its rights considered in its preparation. Plaintiff in error did not comply with the requirements of rule 8, section 1, of the rules of this court, providing that the plaintiff in error shall serve upon the defendant in error a copy of his praecipe indicating the material

to be incorporated in the transcript of record before this court. The praecipe found on pages 117 and 118 of the transcript fails to show service of the same upon the defendant in error. The defendant in error, in making this suggestion of diminution, is taking the first opportunity presented for completing the record. A copy of the printed record was received by the defendant in error on July 8, 1914. Upon the discovery of the above omissions, the attorney for the plaintiff in error was asked to consent to an amendment of the transcript to include the omitted matter. He refused to do so.

Consideration of the omitted matter is absolutely essential to a determination of the questions involved in the present writ of error.

The plaintiff in error excepts to the action of the District Court in sustaining demurrers to the pleas of former jeopardy. That action was based upon all the earlier related proceedings. This court, in reviewing the same action, should have before it the same record.

The Circuit Court of Appeals had held, *upon an assignment of error to that effect by Shapiro himself*, that the record did not show that the plea of *nolo contendere* had been accepted, and that the judgment rendered by the District Court was therefore—

unsupported for want of *either* of the authorized pleas to the indictment. (196 Fed. 268.)

The said court, in summarizing one of the propositions of error urged by the plaintiff in error, says that it did—

not appear in the record that the plea tendered on behalf of the defendant was either accepted in fact as a *nolo contendere* plea, or substantially so treated * * * in the subsequent proceedings. (*Ib.*, 267, 268.)

In the face of the above position taken by him in the Court of Appeals, and of its favorable decision secured by that contention, Shapiro pleads former jeopardy. He now affirms that his plea of *nolo contendere* had been, after all, *accepted*, and that the former judgment of the District Court was therefore such as to have put him in legal jeopardy. The several steps taken by Shapiro to establish this new position have been recited at length. Each was in direct opposition to the decision of the appellate court which he had sought. The legal result of that decision was that there had been no former jeopardy. Then Shapiro sought to show that the facts of the record upon which the said decision was based either were, or should have been, otherwise; and to explain the record by having it amended. What the circumstances really were appears in no way more clearly than by a study of his unsuccessful attempts to prove them otherwise.

In filing his plea of former jeopardy, Shapiro challenged the right of the District Court to further prosecute him. That court was attempting to

execute the mandate of the Court of Appeals in accordance with the opinion and judgment of the latter. Shapiro was insisting that the District Court, in proceeding in accordance with the said mandate, was proceeding unjustifiably and contrary to law. The court, in sustaining demurrers to the pleas of former jeopardy, took the position that it was proceeding in the only manner open to it. This court is now called upon to determine whether the District Court was justified in that position. In his application to the District Court to amend its judgment, filed the same day as one of his pleas of former jeopardy, Shapiro refers the court to the entire record in the case. It was upon this "entire record" that the District Court sustained the demurrers to the said pleas, and that record should be before this court.

This court has very recently exercised the power, the exercise of which is invoked in the instant motion. In *Union Trust Company of St. Louis v. Westhus*, 228 U. S. 519 (May 5, 1913), this court dealt with a situation almost identical with that involved in the case at bar. The case was before this court to review a judgment of a Circuit Court. That court, justifying a recovery, had sustained a demurrer to the answer. Defendants not desiring to plead further, judgment was entered for the plaintiff. The case was then taken to the Circuit Court of Appeals. That court reversed the judgment of the court below and the case was remanded with directions to overrule the demurrer, and for

further proceedings consistent with the views expressed in the opinion of the court. Upon receipt of the mandate the trial court allowed the plaintiff to file an amended petition. A demurrer to this amended petition was sustained, judgment was entered for the defendant, and the case was brought directly to this court upon the theory that a constitutional question was involved. This court, speaking through Mr. Chief Justice White, said at page 521:

* * * The assignment of error invoked a reexamination of all the issues including those which had been adversely passed on by the Circuit Court of Appeals. On these assignments the case was argued at bar and taken under advisement on a record which contained only the proceedings had in the trial court subsequent to the filing of the mandate of the Circuit Court of Appeals. While in that situation the published report of the opinion of the Circuit Court of Appeals came under our observation. Mindful of the proper consideration due to the Circuit Court of Appeals and of our duty at all times to be scrupulous to keep within our jurisdiction for the purpose of enabling us to apply the doctrine announced in the case of *Aspen Mining and Smelting Company v. Billings* (150 U. S. 31), in which case, as in this, the record did not disclose that the cause had been passed upon by the Circuit Court of Appeals, although there was on the files of this court certiorari proceedings so

showing, to which resort was had, *we directed that the court below supply the deficiency, if any there was, in the record, by certifying all the proceedings had in the case.* At once, by stipulation of counsel, an additional transcript was filed stating the proceedings on the first trial, the taking of the appeal to the Circuit Court of Appeals and the action of that court, and in the light thus afforded we come first to consider our jurisdiction over the controversy.

In the above case this court, *sua sponte*, exercised the power which the Government prays to have exercised in the present case. It directed that the court below supply the deficiency in the record by certifying all the proceedings had in the case. "At once," (the opinion reads), counsel agreed to insert the missing matter, in order that this court might have before it a full record upon which to consider the case. In our case counsel for the plaintiff in error has refused to agree to insert the missing matter.

In the *Westhus* case just cited the assignments of error involved a reexamination of the issues decided by the Circuit Court of Appeals. In the case at bar this is equally true. The action of the District Court in complying with the mandate of the Court of Appeals is under review. This court can not determine the validity or invalidity of that action without knowing what was "the law of the case" for the District Court. This depended upon

the resolution of the issues presented to the Circuit Court of Appeals. As this court said in the *Westhus* case, because of the consideration due to the Circuit Court of Appeals, and because of the necessity of applying the doctrine of the case of *Aspen Mining and Smelting Company v. Billings* (150 U. S. 31, 37), it is essential that this court know what issues have been determined by that court.

That a portion of the proceedings previously had in the *Shapiro* case are recorded only in the Circuit Court of Appeals puts no difficulty in the way of producing the record before this court. The phase of the situation which caused this court in the *Westhus* case to require the certification of additional records was not that those proceedings were recorded in the Circuit Court, but that *they had been had before the Circuit Court of Appeals*. This court directed the certification of "all the proceedings had in the case."

The petition by Shapiro asking the Circuit Court of Appeals to release its mandate in order that the judgment below might be amended, and the denial thereof by the Court of Appeals, constitutes as important a proceeding had in the present case before the Circuit Court of Appeals as the writ of error itself. Suppose that court had released its mandate and the District Court had thereupon amended its judgment to show the acceptance of the plea of *nolo contendere*. The judgment of the Court of Appeals would then have been meaning-

less, at least in part, and the mandate would not only have been released, but a new mandate would have had to issue. The refusal of the Circuit Court of Appeals to do this was as vital to the issues as would have been a recognition of Shapiro's position. That refusal not only constitutes a vital element in determining what was held by the Circuit Court of Appeals to be "the law of the case," but it was a very important factor in the action of the District Court, which this court is now reviewing. The denial by the Circuit Court of Appeals of Shapiro's motion was, in effect, an affirmance of its own judgment and mandate. Such an affirmance is as much a part of the law of the case as would have been a laborious opinion of reversal. It was binding upon the District Court, and, because not reviewed, is binding upon this court, under the doctrine of the *Aspen* case, referred to *supra*. Having become the law of the case, this court should have before it a complete record of the proceedings from which it resulted.

Wherefore, the defendant in error moves the court under rule 14 of the rules of this court to award writs of certiorari to be issued and directed to the judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, and of the United States Circuit Court of Appeals for the Seventh Circuit, commanding them, that searching the record and proceedings in said cause they forthwith certify to this

court those parts of said record so omitted and on file in their respective courts as aforesaid.

JOHN W. DAVIS,
Solicitor General.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

OCTOBER, 1914.

CITY OF WASHINGTON,
District of Columbia, ss:

Personally came before me the subscriber, John W. Davis, Solicitor General, attorney for the defendant in error, who, being duly sworn, says that the foregoing motion is true in point of fact.

Sworn and subscribed to before me, a notary public in and for the District of Columbia, this second day of October, 1914.

CHAS. B. SORNBORGER,
Notary Public.

APPENDIX "A."

Petition for writ of error and assignments of error, filed Feb. 3, 1911. (Omitted item No. 1.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

The United States *vs.* David Shapiro.

PETITION FOR WRIT OF ERROR.

And now comes David Shapiro, and respectfully shows that the District Court of the United States for the Northern District of Illinois, Eastern Division, did on the 23rd day of January, 1911, on a plea of *nolo contendere*, sentence this petitioner to be confined in the Leavenworth Penitentiary for the period of two years (2), and to pay a fine in the sum of ten thousand dollars (\$10,000.00).

And your petitioner respectfully shows that in the said record, proceedings and judgment lately pending against your petitioner, manifest errors have intervened to the prejudice of your petitioner, all of which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore this petitioner respectfully prays that a writ of error may be allowed herein from the United States Circuit Court of Appeals for the Seventh Circuit, to the District Court of the United States, Northern District of Illinois, Eastern Divi-

sion, and that the record, proceedings and judgment aforesaid may be removed from said District Court to said Circuit Court of Appeals to the end that the same may be in and by said Court of Appeals accepted, reviewed and considered, and that the errors aforesaid and each and every of them may be corrected according to law, and that the said writ of error may be made a supersedeas, and your petitioner be released on bail in an amount to be fixed by this Court.

WILLARD M. McEWEN,
Attorney for Plaintiff in Error.

ASSIGNMENT OF ERRORS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

United States *v.* David Shapiro.

And now comes David Shapiro, the plaintiff in error, and in connection with his petition for a writ of error, says that in the record, proceedings and judgment aforesaid, as detailed in said petition lately pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, error has intervened to the prejudice, and this plaintiff in error here assigns the following errors, to-wit:

First: The District Court had no jurisdiction to pass judgment on this plaintiff in error in this case on a plea of *nolo contendere*.

Second: The District Court erred in sentencing this plaintiff in error without a trial by jury.

Third: By the judgment of the said District Court of the United States, plaintiff in error was deprived of his liberty without due process of law

within the meaning of the Fifth Amendment to the Constitution of the United States of America.

Fourth: The sentence is excessive and should be limited to a fine only.

Wherefor said plaintiff in error, by reason of the errors aforesaid, prays that the said judgment of the District Court of the United States may be reversed and held for naught.

WILLARD M. McEWEN,
Attorney for Plaintiff in Error.

(Endorsed:) Petition for Writ of Error and Assignment of Errors. Filed Feb. 3, 1911. Edward M. Holloway, Clerk.

APPENDIX " B. "

Writ of error from Circuit Court of Appeals, filed Feb. 6, 1911.
(Omitted item No. 2.)

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and of a plea which is in the said District Court before you, or some of you, between the United States of America, plaintiff, and David Shapiro, defendant, a manifest error hath happened, to the great damage of the said David Shapiro, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the

Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the third day of February, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Allowed by
Peter S. Grosseup.

RETURN TO WRIT.

NORTHERN DISTRICT OF AMERICA, ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this Twenty-fourth day of February, A. D. 1911.

[SEAL.] T. C. MACMILLAN,
*Clerk of the District Court of the United
States for the Northern District of Illinois.*

(Endorsed:) Writ of Error. Filed Feb. 6 1911
at 9 o'clock a. m. T. C. MacMillan, Clerk.

CERTIFICATE OF CLERK.

IN THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of

Illinois, do hereby certify the above and foregoing to be a true transcript of the record in Case No. 4451, wherein The United States is Plaintiff and David Shapiro is Defendant, as same appeared from the record and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office at Chicago in said District, this Twenty-fourth day of February, A. D. 1911.

ORDER OF FEB. 3, 1911.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

United States vs. David Shapiro.

Order for Supersedeas and Bail.

Let a writ of error be allowed herein as prayed for, which is hereby made a supersedeas, and pending the disposition of the said writ of error, it is ordered that the said plaintiff in error be admitted to bail in the sum of Five Thousand (\$5000) for his appearance in manner and form as provided by law.

And the said plaintiff in error hereby tenders his bond with Hinde Shapiro and David Horwich as surety, which is hereby approved by the Court, and plaintiff in error is hereby ordered released from custody.

P. S. GROSSCUP,
*Presiding Justice of the United States Circuit
Court of Appeals for the Seventh Circuit.*

(Endorsed:) Order granting Writ of Error, etc.
Filed Feb. 3, 1911. Edward M. Holloway, Clerk.

APPENDIX "C."

Opinion Circuit Court of Appeals. (Omitted item No. 3.)

SHAPIRO v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,777.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against David Shapiro. Judgment of conviction, and defendant brings error. Reversed.

Willard M. McEwen, for plaintiff in error.

James H. Wilkerson and Harry A. Parkin, for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The judgment from which this writ of error is brought pronounces, upon a finding of guilty as charged in the indictment, that the plaintiff in error be imprisoned in a penitentiary for two years and pay a fine of \$10,000 besides the costs, under an indictment charging in several counts various violations of the internal revenue

statutes, with a plea of *nolo contendere* tendered as the only plea thereunder. The errors assigned are identical with those assigned in *Tucker v. United States* (No. 1,776) 196 Fed. 260, 115 C. C. A. —, decided herewith, and no distinction from the indictment and record of proceedings there presented and considered appears in the present case, in so far as material for decision. So the opinion and ruling therein is applicable to this writ, and the judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed further in conformity with law.

TUCKER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.)

No. 1,776.

1. CRIMINAL LAW (§ 275*)—PLEA OF “*Nolo Contendere*”—NATURE AND EFFECT.

The so-called plea of “*nolo contendere*” is not a plea in the strict sense of that term in the criminal law. It is not one of the pleas, general or special, open to the accused in all criminal prosecutions and is allowable only under leave and acceptance by the court. When accepted by the court, it becomes an implied confession of guilt, and for the purposes of the case only equivalent to a plea of guilty, but distinguishable from such plea in that it can-

not be used against the defendant as an admission in any civil suit for the same act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §635; Dec. Dig. §275.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4814, 4815.]

2. CRIMINAL LAW (§275*)—PLEA OF NOLO CONTENDERE—WHEN ALLOWABLE—LIMITATIONS OF RULE.

Under the common-law rule, which governs in the federal courts, to authorize the court to entertain a plea of nolo contendere the case must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may as well be punishable by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine; and such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any time, with or without fine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §635; Dec. Dig. §275.*]

3. CRIMINAL LAW (§275*)—PLEA OF NOLO CONTENDERE—WHEN ALLOWABLE.

When an indictment contains counts charging offenses for which the statute requires the imposition of punishment by both fine and imprisonment and others for offenses which may be punished by fine alone, the court has authority to allow a tendered plea of nolo contendere;

but in such case the further proceedings and punishment must be confined to the latter class of counts to which alone the plea is applicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 635; Dec. Dig. § 275.*]

4. CRIMINAL LAW (§ 275*)—JURISDICTION—CONVICTION WITHOUT JURY TRIAL.

Where a plea of *nolo contendere* was tendered to an indictment containing counts some of which charged offenses which required punishment by both fine and imprisonment, while on others a fine alone might be imposed, the action of the court in hearing evidence, making a finding of guilty as charged and sentencing defendant to both fine and imprisonment, was inconsistent with the acceptance of such plea, and the judgment of conviction without a jury trial was without jurisdiction and void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 635; Dec. Dig. § 275.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against Abraham Tucker. Judgment of conviction, and defendant brings error. Reversed.

This writ of error is brought from a sentence and judgment against the plaintiff in error, under an indictment which charges (in several counts) violations of the internal revenue statutes, described in the brief for defendant in error as "aiding and abetting in the removal of nontax-paid spirits, concealing nontax-paid spirits, the reuse of stamped

packages, the failure to destroy revenue stamps upon the removal of the spirits contained in certain packages, and charges of like nature."

The record shows: That the accused appeared with his attorney and "by leave of court" withdrew his plea of not guilty; that being "now arraigned upon the indictment," he "pleads nolo contendere thereto"; that the court then directed the cause set for hearing; that sundry hearings of evidence ensued, and the court took "the cause under advisement"; and that thereafter judgment was pronounced as follows:

Come again the parties by their attorneys and the defendant in his own proper person, and the court, having considered and being fully advised in the premises, finds the defendant Abraham Tucker guilty as charged in the indictment, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and ordered by the court and is the sentence and judgment of the court upon the finding of guilty as aforesaid, that said Abraham Tucker be confined and imprisoned in the United States penitentiary at Leavenworth, Kan., for and during a period of 18 months, and that he forfeit and pay to the United States a fine in the sum of \$2,500 besides the costs in this behalf expended, for which let execution issue.

Elijah N. Zoline, for plaintiff in error.

James H. Wilkerson and Harry A. Parkin, for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The indictment against the plaintiff in error contains several counts, charging violations respectively of internal revenue statutes, which are not punishable alike. In one or more counts the charge appears to rest on section 3296, R. S. (U. S. Compt. St. 1901, p. 2136), which imposes both fine and imprisonment—the fine to be not less than \$200, nor more than \$5,000, and the imprisonment not less than three months nor more than three years—while other counts appear to charge offenses which are either punishable by fine alone, or may be so punished. It is contended therefore that the offenses charged under section 3296 are statutory felonies—both as defined in section 335 of the New Criminal Code, 35 U. S. Stat. p. 1152, alleged to be applicable to the case, and under the authorities exemplified and cited in *Fitzpatrick v. United States*, 178 U. S. 304, 307, 20 Sup. Ct. 944, 44 L. Ed. 1078—although such offenses may be punished, as in cases of misdemeanor, by fine and imprisonment for a term less than one year. The sentence and judgment of the trial court imposed a fine of \$2,500 and imprisonment for 18 months, as for a felony, reciting (among other statements) that the court “finds the defendant Abraham Tucker guilty as charged in the indictment,” while the record shows sundry hearings before the court, without a jury, after the defendant “by leave of court” withdrew

“his plea of not guilty,” theretofore entered, and “being now arraigned * * * pleads nolo contendere.” Whereupon the cause was set down for subsequent hearing.

For reversal of this judgment the contentions are, in substance:

(1) That the purported plea of nolo contendere was not entertainable under the assumed charge of felony, nor under any charge requiring imprisonment, and thus constituted no answer to the indictment, so that the conviction, without jury trial, was unauthorized; or, if entertainable, (2) that the judgment is in derogation of such plea and unauthorized. Both propositions rest on the common-law definitions of this plea of “nolo contendere,” and it is unquestionable that the common-law rule must govern, in the absence of any federal statute providing therefor; and the questions thus raised, by way of challenging the judgment, are plainly involved for decision in the case at bar. However frequent and general the practice may have been, in the federal jurisdiction to allow such plea in like criminal prosecutions, as stated by counsel in the arguments, the only reported case cited as a federal precedent is *United States v. Hartwell*, 3 Cliff. 221, 26 Fed. Cas. No. 15,318, and in that case (as hereinafter explained) the question whether the plea of nolo contendere therein referred to was allowable, under the common-law rules, is neither decided nor mentioned. So the answer to either of the contentions must be derived from definitions of the plea in the common-law authorities.

[1] 1. How is the plea of nolo contendere thus limited and defined?

These premises for the inquiry are well recognized alike in all the citations: The so-called plea raises no issue of law or fact under the indictment, is not one of the pleas, general or special, open to the accused in all criminal prosecutions, and is allowable only under leave and acceptance by the court. It is not a plea, in the strict sense of that term in the criminal law, but a formal declaration by the accused, that "he will not contend with the" prosecuting authority under the charge. When accepted by the court, it becomes an implied confession of guilt, and, for the purposes of the case only, equivalent to a plea of guilty, but distinguishable from such plea, in that it "cannot be used against the defendant as an admission in any civil suit for the same act."

The leading authority upon this plea—accepted as such in Chitty's Criminal Law and other textbooks and in the line of American decisions cited below—appears in Hawkins Pleas of the Crown, published early in the eighteenth century. The rule is thus stated, in chapter 31, under the title "Of Confessions and Demurrer" (volume 2 [8th English Ed.] p. 466), after reference to the express confession of guilt, as follows:

An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; in which case, if the court think fit to accept of such submission, and make an entry that the defendant posuit se in gratiam regis, without putting him to a direct confession, or plea (which

in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum*.

In Chitty's Criminal Law, c. 10 (see 4th Am. from 2d London Ed. p. 430), the author thus states the rule:

An implied confession is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king's mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper. If they grant the request, an entry is made to this effect, that the defendant "*non vult contendere cum domina regina et posuit se in gratiam curiæ*," without compelling him to a more direct confession. The difference in effect between an implied and an express confession is that, after the latter, not guilty cannot be pleaded to an action of trespass for the same injury; whereas it may at any time be done after the former. But no confession, however large and explicit, will prevent the defendant from taking exceptions in arrest of judgment to faults apparent in the record; for the judges must *ex officio* take notice of them, and any one, as *amicus curiæ*, may point out the exceptions.

The only judicial expression of the rule in England, referred to in any of the authorities cited,

appears in Salkeld's Reports of decisions by Chief Justice Holt, in *Queen v. Templeman*, decided in 1778 (volume 1, p. 55), reported as follows:

Upon a motion to submit to a small fine, after a confession of the indictment which was for an assault, Holt, Chief Justice, took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove son assault upon the prosecutor in mitigation of the fine; otherwise where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domina regina pon se in gratiam curiæ*.

Defendants may submit to a fine, though absent, if they have a clerk in court that will undertake for the fine. Hill. 2 Ann. Hickeringil's case was that he and his daughter were indicted for trespass, and Hickeringil only appeared on the motion to submit to a small fine. But where a man is to receive any corporal punishment, judgment can not be given against him in his absence, for there is a *capias pro fine*; but no proofs to take a man and put him on the pillory. *Vide tit. Judgments.* * * * Duke's case.

The foregoing are the only English definitions of the "*nolo contendere*" plea which have come to our attention as directly applicable to the present inquiry; and it is unquestionable thereunder that capital cases of that period were not within the rule for allowance of the plea when the common-law rules became operative in this country. Whether these definitions exclude, as well, all cases of indictment for felony, as contended on the part of the

plaintiff in error, is a question not free from difficulty. While a leading American text-book on criminal law and procedure (1 Bishop's New Criminal Procedure, § 802, and in earlier editions) states that "it is pleadable only by leave of court and in light misdemeanors," we are not advised of any judicial ruling, English or American, which either expressly so limits the plea, or designates the class of cases wherein it may be accepted.

By way of support for the plea in the case at bar, the above-mentioned federal case and several lines of state court cases are relied upon. In the federal case (*United States v. Hartwell*, ante) the report states, in effect, that the indictment ran against three defendants, one charged, as a public officer, with embezzlement of public funds in his keeping, and the other two charged with advising and participating in such officer's unlawful acts; that the act of the officer was a statutory felony, while the charge against the other defendants was characterized as a misdemeanor; that at the opening of the trial the officer (principal) "retracted his plea of not guilty and pleaded *nolo contendere*, which was accepted by the district attorney"; that the principal "retired from the bar and the jury were impaneled for the trial of the other defendants," and their conviction ensued; and that the hearing reported was before the Circuit Justice and District Judge on their motion, upon exceptions, for a new trial. The opinion of Mr. Justice Clifford (as Circuit Justice) overruling the various exceptions does not indicate that it was questioned or considered in the case whether the plea of *nolo contendere* on the part of the principal defendant was rightly allowed, and we understand the motion to be de-

nied irrespective of such allowance or its effect. The ruling appears to be, in substance, that the remaining defendants were charged and convicted under the statute for aiding and abetting the embezzlement, as confederates and principals, "differing only in degree" from the offense charged against the other defendant, the treasury officer, and that conviction of such officer was not needful to uphold their conviction. While the opinion proceeds in further extended discussion of the case, on the theory for which these defendants contended, that they were charged as mere accessories, not principals in any sense, and (upon review of the authorities) indicates the view that, treated as accessories, the evidence of sundry confessions of guilt on the part of the principal defendant was admissible and sufficient to support their conviction. In the course of such remarks, mention is made of the action of the principal defendant as tantamount to conviction, and that the suggestion of "a distinction between the plea of *nolo contendere* and the plea of guilty" was entitled to no weight, as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment"—citing *Com. v. Horton*, 9 Pick. (Mass.) 206, and 1 Wheat. Crim. Law. We do not understand the decision to rest thereon, nor that the reference to the plea amounts to judicial confirmation of its allowance by the trial court, nor bears upon the present inquiry, beyond such value as may appear from the fact of allowance, seemingly unquestioned.

The other American citations are from various state reports, recognizing and defining the plea of

nolo contendere in its common-law nature and effect, and the opinions are exceedingly instructive and harmonious in the definitions we have recapitulated. They are as follows:

In Massachusetts (*Com. v. Horton*, 9 Pick. 206; *Com. v. Tilton*, 8 Mete. 232; *Com. v. Adams*, 6 Gray, 359; *Com. v. Ingersoll*, 145 Mass. 381, 14 N. E. 449); in Rhode Island (*State v. O'Brien*, 18 R. I. 105, 25 Atl. 910, and *State v. Conway*, 20 R. I. 270, 38 Atl. 656); in New Hampshire (*State v. La Rose*, 71 N. H. 435, 52 Atl. 943); in Maine (*State v. Siddall*, 103 Me. 144, 68 Atl. 634, and *State v. Herlihy*, 102 Me. 310, 66 Atl. 643); and in other states (*Peacock v. Judges*, etc., 46 N. J. Law, 112; *Com. v. Holstine*, 132 Pa. 357, 19 Atl. 273; *Birchard v. Booth*, 4 Wis. 67, 90). Although the question here presented of limitation placed upon allowance of the plea at common law is neither decided (in terms) nor referred to in any of these cases, it is contended that inferential authority appears therein for the proceedings in the case at bar, for the reason that two of the cases involved both fine and imprisonment under the plea and two others involved imprisonment alone. The cases referred to are: *State v. Herlihy*, 102 Me. 310, 66 Atl. 643, and *Com. v. Holstine*, 132 Pa. 357, 19 Atl. 273—each showing the plea allowed under a charge of misdemeanor and sentence of fine and minor term of imprisonment; *State v. Conway*, 20 R. I. 270, 38 Atl. 656, showing plea allowed under a charge of larceny and imprisonment thereupon; and *Peacock v. Judges*, etc., 46 N. J. Law, 112, wherein the plea was entered under charge of conspiracy, followed

by sentence (as reported) "to the State Prison." Whether allowance of the plea in either of these cases was governed by statute—as in Massachusetts, *vide* Com. v. Adams, 6 Gray, 359—we are not advised, nor is it deemed needful to attempt inquiry for the reason of passing either of such allowances unquestioned. We believe these mere instances of fact, appearing alone in the facts of the case without comment in the opinion, are not entitled to consideration and force (persuasive or otherwise) as rulings of the courts respectively, that such pleas were accepted under and within the common-law rule, and that they neither control nor aid the inquiry, whether *nolo contendere* was pleadable in the case at bar.

In this view, statutory regulation of the plea, in accord with the present-day legislation in respect of crimes and their punishment, would seem desirable—as instanced in various states—and without provision therefor in federal statutes, the elementary common-law authorities must furnish the solution. While they concur, as above stated, in the terms of their rule, difficulty may arise in applications thereof to American conditions. Thus formulated in the eighteenth century, the common-law rule distinctly limits the plea, as an implied confession, to a "case not capital," with the further provisions that it constitutes a "submission" which may be accepted by the court "where a defendant * * * doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine." And the first inquiry raised is whether these requirements do not exclude as well all cases of felony.

Although at the period of adoption of the rule most of the crimes termed felonies were also capital cases, not all felonies were punished by death, so that the term "capital cases," taken alone, would not include all felonies, either as then defined or under our later American definitions, statutory and judicial. We believe Blackstone's definition to be applicable for the inquiry, namely, that felony is "an offense which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment may be superadded according to the degree of guilt" (2 Cooley's Blackstone, book 4, p. 93); and that the distinction of capital cases therefrom, as pointed out by him (page 97), must be observed, notwithstanding his remark, that such meaning was "repugnant to the general idea which we now entertain of felony, as a crime to be punished by death."

Nevertheless, the further provisions of the rule are of undoubted force in its interpretation; and while they refer only to the punishment which may be within the contemplation of such submission, we believe the rule thus excluded by necessary implication, not only capital cases, but all offenses at common law for which punishment must be imposed inconsistent with the purposes of the rule. The settled policy at common law in reference to the reception of the so-called "express confession" of the accused on arraignment, or plea of guilty, may be instructive as a background for this rule, namely, that such confessions were not commonly accepted and recorded as convictions in cases of felony. In Hawkins Pleas of the Crown (volume 2, § 2, p. 466), it is stated (in the paragraph immediately preced-

ing the definition above quoted as to "implied confessions") :

And where a person upon his arraignment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony, where it doth, yet the judges, upon probable circumstances that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty.

And Sir Mathew Hale (2 Pleas of the Crown, c. 29, p. 225) thus states the rule as to express confessions :

That which I call a simple confession is, where the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead.

[2] The allowance of the "implied confession" as a *nolo contendere* plea, thus defined to be the defendant's yielding to merey in the punishment, "and desiring to submit to a small fine," necessarily implies, as we believe, that the case for such allowance must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may as well be punished by imprisonment, at the discretion of the court, either as an alternative of fine, or in addition thereto, or to enforce payment of the fine. That such desire (or

request, express or implied) on the part of the accused "to submit to a small fine" can neither serve to limit the fine to the minimum prescribed for the offense, nor constitute the measure of fine which may be imposed within the exercise of judicial discretion—that "a small fine" is thus mentioned in the rule as a relative term, intending substantially less than the maximum—we have no doubt. This provision, however, for such purpose in the submission—as the object sought by the defendant in electing to submit without contest—requires construction of the rule accordingly, as limited to cases consistent with the purpose thus declared. So defined, the rule affords no ground for entertaining the plea, either in cases of felony, requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any term, with or without a fine. Constrained to this interpretation of the narrow purpose and use of the plea at common law, by the express provisions of the rule thus handed down, we believe extension of the allowance to include even misdemeanors for which imprisonment must be imposed is unauthorized—however desirable it may seem—without statutory provision therefor. In arriving at such conclusion, we have not overlooked the settled doctrine that such short terms of imprisonment were not "infamous punishment," as defined in England and America for more than a century (see *Mackin v. United States*, 117 U. S. 348, 351, 6 Sup. Ct. 777, 29 L. Ed. 909, and *Fitzpatrick v. United States*, ante), nor the fact that imprisonment, at the time the rule was adopted, was frequently made the alternative of fines, or imposed together with a fine

for "crimes of inferior nature" (2 Cooley's Black. book 4, p. 5) "in which the public punishment is not severe, but affords room for private compensation"—imposed also for commercial indebtedness—and was regarded with far less opprobrium than attaches to every form of imprisonment at the present day. Neither of these considerations appears to have entered into the framing of the rule, and we are not at liberty to adopt a different rule for application to the case at bar.

[3] The contention, however, that the trial court was without jurisdiction to allow the plea under the indictment in the present case, we believe to be untenable, notwithstanding the foregoing interpretation of the rule. It is undoubted that the counts of the indictment, charging an offense for which at least three months' imprisonment must be imposed with a fine, are not within such interpretation, but other counts (as above mentioned) charge offenses which may be punished by fine alone, and thus furnish ground for entertaining the *nolo contendere* plea, as "in the nature of a compromise" between the prosecutor and the defendant. The plea is thus well characterized, under the definitions of Hawkins and Chitty, in *State v. La Rose*, 71 N. H. 435, 438, 52 Atl. 943, viz.:

The plea is in the nature of a compromise between the state and the defendant—a matter not of right, but of favor. Various reasons may exist why a defendant conscious of innocence may be willing to forego his right to make defense if he can be permitted to do so without acknowledging his guilt. Whether in a particular case he should be permitted to do so is for the court.

So, it was within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission. Were the subsequent proceedings consistent with acceptance of the plea in that view, we are satisfied that no reversible error would appear in allowance thereof.

[4] 2. The further propositions of error—in substance, that both proceedings and judgment are in derogation of the plea—we believe to be well assigned as cause for reversal, namely: (1) It does not appear in the record that the plea tendered on behalf of the defendant was either accepted in fact as a *nolo contendere* plea, or substantially so treated (within the foregoing definition) in the subsequent proceedings. (2) The record shows, in substance: That the cause was set down for hearing; that sundry hearings of evidence ensued whereupon the court took “the cause under advisement”; that “the court having considered and being fully advised in the premises, finds the defendant * * * guilty as charged in the indictment”; and that sentence was then pronounced, without mention of the plea. (3) The sentence and judgment directs, “upon the finding of guilty as aforesaid,” imprisonment in the penitentiary for 18 months and payment of a fine of \$2,500 and costs.

That these proceedings and recitals leading up to the judgment are inconsistent with acceptance of the *nolo contendere* plea as tendered must be presumed, as we believe, under either of the contentions for interpretation of the rule. It may be that evidence may be heard under such plea for the purpose of determining the amount of fine to be imposed,

but no issue is presented for trial under the indictment, and no adjudication of guilt is authorized. *Com. v. Horton*, 9 Pick. (Mass.) 206; *Com. v. Ingersoll*, 145 Mass. 381, 382, 14 N. E. 449. The evidence referred to in the record is not preserved, but no presumption can be indulged, in the light of the various recitals, with no acceptance of the plea mentioned, that the evidence was received otherwise than for the purpose of the finding, upon which the judgment appears to be pronounced. Moreover, the judgment is alike inconsistent with acceptance of the plea, as above defined, in pronouncing imprisonment in the penitentiary for 18 months. The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea (*Com. v. Ingersoll*, *supra*), thus leaving it unsupported for want of either of the authorized pleas to the indictment.

The judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of such plea as tendered, and proceed thereupon in conformity with law.

APPENDIX "D."

Motion to correct record and amend judgment. (Omitted item
No. 4.)

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

The United States *vs.* David Shapiro, No. 4451.

MOTION TO CORRECT RECORD.

And now comes the defendant, David Shapiro, in his own proper person, and moves this Court to amend the recitals in the judgment entered by this Court on January 23, 1911, by striking out therefrom the following words: "and the Court having considered and being now fully advised in the premises finds the defendant David Shapiro guilty as charged in the indictment;" and after the words, "and said defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him," add the words: "upon the plea of *nolo contendere* heretofore entered by him;" also amend the order of this Court entered on January 3, 1911, after the words, "and being now arraigned upon the indictment filed herein against him," and before the words, "pleads *nolo contendere* thereto," add the words, "by leave of Court and with the consent of the United States' District Attorney it is

ordered that said plea of *nolo contendere* be accepted."

This motion is made on the ground that the above recitals in the record that the Court found the defendant guilty as charged in the indictment are untrue, because said Court in truth and in fact gave leave to this defendant to withdraw his plea of not guilty and to enter instead a plea of *nolo contendere*, which plea was then and there accepted by the Court and the sentence pronounced on this defendant on January 23, 1911, was in truth and in fact based upon the plea of *nolo contendere* and not upon the finding of guilty by the Court.

This defendant in support of this motion refers the Court to the entire record in this cause and to the minutes of the Clerk and the memoranda of the Judge, and asks leave to produce other competent evidence in support of the truth of this motion, and refers the Court particularly to the order of this Court entered on the 20th day of January, 1911, reading as follows:

"The United States vs. David Shapiro. 4451. This cause coming on to be heard on defendant's plea of *nolo contendere* heretofore entered herein, come the parties by their attorneys and the defendant in his own proper person, and the hearing proceeds, and the Court having heard the evidence by the parties adduced and statements of counsel, and not being sufficiently advised in the premises, takes the cause under advisement."

This application is made for the purpose that justice may be done and that the record of this court may speak the truth, and that same may be corrected to correspond with what actually trans-

pired and had taken place, and for no other purpose.

(Signed) **DAVID SHAPIRO,**
Defendant.

(Signed) STEPHEN A. DAY &
E. N. ZOLINE,
Counsel for Defendant.

STATE OF ILLINOIS,

County of Cook, ss:

David Shapiro, being first duly sworn, deposes and says that the foregoing motion by him subscribed was duly read by him, and that the same is true in substance and in fact.

(Signed) **DAVID SHAPIRO.**

Subscribed and sworn to before me this 15th day
of March, A. D., 1912.

(Signed) MAY E. EVENSEN,
Notary Public.

APPENDIX " E. "

Petition to release mandate, filed March 16, 1912. (Omitted item No. 5.)

UNITED STATES OF AMERICA,
State of Illinois, ss:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

In the matter of David Shapiro, petitioner.

To the honorable judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Your petitioner, David Shapiro, presents this, his petition, to this Honorable Court, and in support thereof, would respectfully show as follows:

1. Your petitioner, in the October Term, A. D. 1910, of this Honorable Court, in cause No. 1777 thereof as plaintiff in error, against the United States of America, defendant in error, prosecuted his writ of error to the District Court of the United States for the Northern District of Illinois, Eastern Division, and reference is hereby respectfully made to the record and proceedings of this Honorable Court with reference thereto. And this Honorable Court is respectfully requested to consider such record and proceedings for the purposes of this petition to the same intent and purposes as though the same were herein set forth at length.

2. Your petitioner respectfully shows to this Honorable Court that in its opinion announced by the Honorable Judge Seaman, one of the Judges of this Court, reference to which is hereby made for the purposes of this petition, as though fully set forth herein at length; the judgment of the said District Court in said cause was reversed and the cause remanded with direction either to accept or refuse acceptance of such pleas as tendered and to proceed thereupon in conformity with law.

3. Your petitioner respectfully shows to this Honorable Court that the mandate of this Honorable Court was filed in the said District Court by the United States Attorney acting on behalf of the United States of America in said cause, on the 15th day of February, A. D., 1912, and that thereupon the United States Attorney moved the said District Court to reject the plea of *nolo contendere* theretofore entered in said cause by your petitioner, which motion was resisted by counsel for your petitioner and objection likewise made by counsel for your petitioner that the Honorable Kenesaw M. Landis, Judge of said District Court, make no order in said cause; that the said Honorable Kenesaw M. Landis, then and there stated that he would not try said cause, that another Judge would be assigned to try said cause against your petitioner, but being conversant with the facts in the case, that he would enter an order rejecting the plea of *nolo contendere* requiring the defendant to plead; that accordingly said Honorable Kenesaw M. Landis, Judge of said District Court directed that an order be entered rejecting said plea of *nolo contendere* and made rule upon your petitioner to plead *instante*, to which ruling your petitioner by his counsel then and there

duly excepted, and upon advice of counsel, refused to plead; that thereupon said District Court directed its clerk to enter a plea of not guilty for your petitioner, to which ruling of said Court, your petitioner then and there duly excepted, all of which appears by the bill of exceptions approved, allowed and settled and made a part of the record in said cause under the signature of the Honorable Kenesaw M. Landis, Judge of said District Court, on 9th day of February, A. D., 1912, and that your petitioner was ordered by said District Court to appear for trial before it on the 12th day of March, A. D., 1912.

4. Your petitioner respectfully shows that it appears in the opinion of this Honorable Court above referred to, that the transcript of the record in said cause, from the said District Court to this Honorable Court, did not show with sufficient clearness whether or not the Honorable Kenesaw M. Landis, Judge of said Court, had accepted the plea of nolo contendere tendered by your petitioner, and that this Honorable Court reversed the judgment of the said District Court with directions to accept or refuse acceptance of such pleas as tendered and proceed thereupon in conformity with law; that while some ambiguity may exist in the transcript of the record of said District Court as written up by the Clerk of said Court, whether the said plea of nolo contendere tendered by your petitioner was accepted by the said Court, nevertheless, in truth and in fact as your petitioner respectfully shows to this Honorable Court the said District Court did accept the said plea of nolo contendere tendered by your petitioner and that, acting under and upon said plea of nolo contendere said District Court heard evi-

dence solely for the purpose of fixing the punishment to be imposed upon your petitioner, and that any recital in said transcript of record to the contrary or ambiguously stated, is merely a misprison of the clerk of said District Court and an error of said clerk for which your petitioner cannot in any way be held responsible.

5. Your petitioner respectfully shows that by force of the mandate of this Honorable Court filed in the said District Court in said cause, the said District Court feels itself embarrassed to correct its said record to show truth, to-wit, that the said Honorable Kenesaw M. Landis, Judge of said District Court did in fact, accept the plea of nolo contendere tendered by your petitioner, though a motion has been filed in said District Court for such purpose, and that it is, therefore necessary in order that justice be done to your petitioner, that leave be granted by this Honorable Court, unto your petitioner to have said mandate released to relieve said District Court of this embarrassment and so that its said record be corrected as herein indicated and if your petitioner be not granted said leave, that the mandate of this Honorable Court hereinabove referred to and described, will work great injustice to the rights of your petitioner, and will compel your petitioner, in violation of his constitutional rights to be deprived of his life and liberty without due process of law, and to be twice put in jeopardy of his life for the same offense, in violation of the Fifth Amendment to the Constitution of the United States of America.

Wherefore your petitioner prays that leave be granted to have said mandate released to relieve the said District Court, accordingly, to enable that

court to correct its record in said cause so as to speak the truth, and to show as in truth and in fact, it should show, that the Honorable Kenesaw M. Landis, Judge of said District Court, did in fact accept the plea of nolo contendere heretofore tendered in said cause by your petitioner.

DAVID SHAPIRO, *Defendant.*

STEPHEN A. DAY

E. N. ZOLINE

Counsel for Pl. in error.

STATE OF ILLINOIS, *County of Cook, ss:*

David Shapiro being duly sworn deposes and says that he is the petitioner mentioned in the above and foregoing petition, that he has read the same, and is familiar with the allegations therein contained, and that the same are true in substance and in fact.

DAVID SHAPIRO.

Subscribed and sworn to before me this 15 day of March, 1912.

[SEAL.] MAY E. EVENSEN, *Notary Public.*

(Endorsed:) Filed Mar. 16, 1912. Edward M. Holloway, Clerk.

APPENDIX " F. "

Affidavits filed in support of petition to release mandate.
(Omitted item No. 6.)

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

United States *vs.* Abraham Tucker, No. 1776.

United States *vs.* David Shapiro, No. 1777.

STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF STEPHEN A. DAY.

Stephen A. Day, being on oath first duly sworn, deposes and says that on the 23rd day of March, A. D. 1912, Charles A. Buell, Deputy Clerk, United States District Court, Northern District of Illinois, did say to this affiant, and after having the same written in his presence did approve and indicate his approval by his signature after the letters O. K., the following:

" That when plea of Not Guilty was withdrawn and Nolo Contendere tendered, I thought of course it was accepted and that it was not necessary to show anything further than that one plea was withdrawn and the other filed, in order to show such acceptance."

Also the following:

“ That there had to be either a plea of Guilty, or a finding or verdict of Guilty, in order to impose sentence, and that as there was no plea of Guilty, or verdict of Guilty in these cases, that it was necessary for the order to show that defendants were found Guilty, and the order was prepared accordingly.”

Also the following:

“ Charles A. Buell, being on oath first duly sworn, says that he is Deputy Clerk, United States District Court, Northern District of Illinois, Eastern Division, and that as such officer he prepared the order of said Court, entered on January 23rd, 1911, when said defendants were sentenced; that said order was prepared from Minute Book, based on the memoranda, true copies of which are hereto attached, and from the recollection and knowledge of this affiant and from no other source or records whatsoever.”

And this affiant further deposes and says that the memoranda referred to in the foregoing were the motion slips pertaining to the orders of January 3rd, 1911 and January 23rd, 1911, in the cases United States of America *vs.* David Shapiro, (No. 4451) and United States of America *vs.* Abraham Tucker (No. 4538), and were as follows:

(For Jan. 3rd, 1912.)

United States District Court—Northern District of Illinois.

Title of Cause: U. S. v. David Shapiro.

Brief Statement of Motion: For trial. Plea Not Guilty withdrawn. Plea of Nolo Contendere entered and hearing set for January 17th.

Title of Cause: U. S. v. Abraham Tucker.

Brief Statement of Motion: For trial. Plea Not Guilty withdrawn. Plea of Nolo Contendere entered and hearing set for January 6th.

(For Jan. 23rd, 1911.)

Title of Cause: U. S. v. David Shapiro.

Brief Statement of Motion: Disposition on Plea Nolo Contendere. Finding of Guilty. Sentence two years in Leavenworth, and fine of \$10,000. Costs. Motion to vacate sentence entered and continued two weeks.

Title of Cause: U. S. v. Abraham Tucker.

Brief Statement of Motion: Disposition on Nolo Contendere. Finding of Guilty. Sentence eighteen months in Leavenworth Pen and Fine of \$2500.00 and costs.

And further this affiant deposes and says that in his conversation with said Charles A. Buell, Deputy Clerk, as aforesaid, he stated to this affiant that there was absolutely no question but that defendants in the above entitled causes were sentenced on the pleas of Nolo Contendere entered by them, and that the order of January 23rd, 1911, was drawn in the form in which it appears in the transcript of record in these causes, because said Charles A. Buell thought that there should be a finding of Guilty inasmuch as there was no plea of Guilty and no verdict of Guilty; that the pleas of Nolo Contendere entered by these defendants were in fact accepted by the Court and such does not appear more clearly in the transcript of record in these causes, because in the opinion of said Charles A. Buell no question should arise in regard thereto, since the order of January 3rd, 1911, shows that the pleas of Not Guilty were withdrawn by leave of Court and

pleas of Nolo Contendere entered, and there was no further or other pleas entered in these causes and that sentence was imposed upon the pleas of Nolo Contendere entered by these defendants.

And this affiant further deposes and says that said Charles A. Buell, Deputy Clerk, as aforesaid, stated to this affiant that the above named orders in these causes were prepared by him without the assistance and previous direction of the Judge of said Court, Honorable Kenesaw M. Landis;

And this affiant further deposes and says that said Charles A. Buell, Deputy Clerk, as aforesaid, stated to this affiant that the orders of January 23rd, 1911, in these causes as found in the transcripts of record heretofore filed in this Court to speak the truth should show that the pleas of Nolo Contendere entered by these defendants were accepted by the Court, and that such fact would have appeared in the orders had not said Deputy Clerk thought and believed that such fact already appeared from the record read in its logical sequence, and inasmuch as said Deputy Clerk was not entirely familiar with the form of order required by law to be entered upon accepted pleas of Nolo Contendere and prepared such orders to the best of his ability, knowledge and information, so as to indicate what he conceived to be the legal effect of the acceptance of such pleas.

And further affiant saith not.

STEPHEN A. DAY.

Subscribed and sworn to before me this 26th day of March, A. D. 1912.

[SEAL.]

MORRIS K. LEVINSON,
Notary Public, Cook County, Illinois.

(Endorsed:) Filed Mar. 28, 1912. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA

Northern District of Illinois, Eastern Division, ss:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SEVENTH CIRCUIT.

United States *vs.* Abraham Tucker, No. 1776.

United States *vs.* David Shapiro, No. 1777.

STATE OF ILLINOIS

County of Cook, ss:

Morris K. Levinson, being first duly sworn on oath deposes and says that on the 27th day of March, 1912, he diligently examined and inspected the dockets and the indictments relating to the cases hereinafter named, now in the office of the Clerk of the U. S. District Court for the Northern District of Illinois, Eastern Division; that all the said cases as appear from said indictments arose out of violations of the internal revenue laws in connection with the Illinois Fruit Distilling Company.

That the docket in case No. 4532, United States *vs.* Isador Kohn, shows, among other entries, the following:

“ October 19, 1910, Plea of not guilty.

“ January 20, 1911, Plea of not guilty withdrawn. Plea of nolo contendere ent'd.

“ January 23, 1911, Finding of guilty. Fine \$2,000, and costs.”

That the docket in case No. 4539, United States *vs.* William Schimberg, shows, among other entries, the following:

“ October 19, 1910, Plea of not guilty.

“ January 18, 1911, Plea of not guilty withdrawn. Plea of nolo contendere entered.

" January 23, 1911, Finding of guilty. Fine \$1,500, and costs."

That the docket in case No. 4531, United States *vs.* Siegmund Natenberg, shows, among other entries, the following:

" October 19, 1910, Plea of not guilty.

" January 20, 1911, Plea of not guilty withdrawn. Plea of nolo contendere entered.

" January 21, Evidence heard and continued.

" January 23, Finding of guilty. Fine \$1,000, and costs."

That the docket in case No. 4533, United States *vs.* Louis Mendelsohn, shows, among other entries, the following:

" October 19, 1910, Plea of not guilty.

" January 5, 1911, Plea of not guilty withdrawn. Plea of nolo contendere entered.

" January 23, 1911, Finding of guilty. Fine \$1,000, and costs."

That the docket in case No. 4534, United States *vs.* Berthold Weis, shows, among other entries, the following:

" October 19, 1910, Plea of not guilty.

" January 20, 1911, Plea of not guilty withdrawn. Plea of nolo contendere entered.

" January 23, 1911, Finding of Guilty. Fine \$1,000, and costs."

That the docket in case No. 4511, United States *vs.* Jacob Shapiro, shows, among other entries, the following:

" December 23, 1910, Plea of not guilty.

" January 17, 1911, Plea of nolo contendere.

" January 20, 1911, Evidence heard and advisement.

“ January 23, Finding of guilty. Fine \$500, and costs.”

And further affiant sayeth not.

MORRIS K. LEVINSON.

Subscribed and sworn to before me this 27th day of March, 1912.

[SEAL.]

MAY E. EVENSEN,
Notary Public.

(Endorsed:) Filed Mar. 28, 1912. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA,

Northern District of Illinois, Eastern Division.

In the United States Circuit Court of Appeals,
Seventh Circuit.

The United States *vs.* David Shapiro, No. 1777.

STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF WILLARD M. McEWEN.

Willard M. McEwen, being first duly sworn, deposes and says that he is an attorney and counsellor at law, admitted to practice in the Supreme Court of the United States and in this court, as well as in the courts of the State of Illinois; that he is and was of counsel for David Shapiro, the defendant in the above entitled cause; that with the consent of the United States' District Attorney for the Northern District of Illinois, he, as counsel for David Shapiro, asked leave of Court to withdraw the plea of not guilty theretofore entered by the said Shapiro, and with the consent or approval of he District Attorney to substitute instead a plea of nolo

contendere, and that thereupon in open court and in the presence of the defendant, the District Attorney saying nothing, David Shapiro, the defendant, by leave of his Honor K. M. Landis, Judge of this court, withdrew the plea of not guilty for the said defendant, and entered a plea of nolo contendere, which plea was then and there accepted by the said Judge, who stated in open Court "Let the plea of not guilty be withdrawn and a plea of nolo contendere entered;" that thereupon the Court set the cause down for hearing for the sole purpose of determining the extent of the punishment to be inflicted upon said defendant, and that the said Court heard evidence for that purpose and none other; that it was the understanding of affiant that said Court was acting under said plea, and has so acted at the time of passing sentence upon this defendant; that it was only after the transcript of the record was written up, that affiant discovered that the record contained a recital that "the Court found the defendant guilty as charged in the indictment." Affiant therefore believes that the record in this cause showing that the Court found the defendant guilty as charged in the indictment is not correct, and is a misprision on the part of the Clerk, and that the record to show the truth should show that the action of the Court was on a plea of nolo contendere as having been accepted by the Court.

And further affiant saith not.

W. M. McEWEN.

Subscribed and sworn to before me this 15th day of March, A. D. 1912.

JOSEPH E. BIDWILL, JR.,

Clerk Circuit Court of Cook County, Illinois.

(Endorsed:) Filed Mar. 28, 1912. Edward M. Holloway, Clerk.

APPENDIX "G."

Transcript of proceedings in re sentencing of defendant.
(Omitted item No. 7.)

STATE OF ILLINOIS, *County of Cook*, ss:

United States of America *vs.* David Shapiro,
No. 4451.

Roy E. Fuller, being first duly sworn, upon oath deposes and says that he is, and for eleven years past has been a court reporter;

That during the month of January, 1911, he was connected with the office of Satterlee & Binns, court reporters, having their principal office in the Opera House Block, Chicago, Illinois.

This affiant further states that on the 20th day of January, 1911, in his capacity as court reporter as aforesaid, he was present in the court of Judge Kenesaw M. Landis, District Judge for the Northern District of Illinois, in connection with the case of United States of America *vs.* David Shapiro, No. 4451, and that on the day and year aforesaid, certain proceedings were had in said case before said Judge Landis which as such court reporter he then and there accurately reported and took down in shorthand.

This affiant further says that the following transcript of evidence is a true and correct typewritten transcript made from the original shorthand notes so taken by him as aforesaid, and truly, correctly

and fully shows all proceedings and transactions had in the said district court before said Judge Landis on the day and year aforesaid, in connection with the case of United States *vs.* David Shapiro, No. 4451, and that the following shows all the evidence and transactions had in connection with the said case on said day: and further affiant saith not.

ROY E. FULLER.

Subscribed and sworn to before me this 10th day of April A. D. 1912.

[SEAL.]

MURRAY J. BRADY,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois, Eastern Division.

United States of America *vs.* David Shapiro.

BILL OF EXCEPTIONS.

Be it remembered, That heretofore to-wit, on the 20th day of January, A. D. 1911, being one of the days of said term of court, before his Honor Kene-saw M. Landis, one of the Judges of said Court, this cause came on for trial upon the pleadings heretofore filed herein.

Edwin W. Sims, by Harry A. Parkin and Henry W. Freeman, appearing on behalf of the Government.

William M. McEwen, appearing on behalf of the defendant.

And thereupon the Government, to maintain the issues upon its behalf, introduced the following evidence, to-wit:

Mr. PARKIN. If the court please, the indictment in this case is upon counts four, eight, nine and twelve. I think the evidence in this case will show that the defendant was a wholesale liquor dealer and rectifier, that a very large proportion of the products of the Illinois Fruit Distillery found its access to the market and to the trade through the medium of the defendant's store. The number of gallons will be, I think, about 15,000 or 20,000; and the testimony will show that during all of the time, from the beginning of the distillery, Mr. Shapiro was receiving it taking off stamps, and returning them, and had full knowledge of the entire situation.

Mr. McEWEN. Our principal controversy with the government would be as to the quantity, our contention being that there was anywhere from 5,000 to 8,000 received by this defendant, according to his best judgment and recollection; he kept no books, as was characteristic of his class of dealers.

Mr. PARKIN. Now, Judge, is there any dispute, or is it necessary for us to go into the history of the distillery itself?

Mr. McEWEN. Oh, no.

Mr. PARKIN. It is admitted, then, on the record, that the chief business of the distillery was the manufacture of illicit goods.

Mr. McEWEN. No controversy on that.

MAX BRONSTEIN called as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination by Mr. PARKIN:

Q. Have you been sworn in this case, Mr. Bronstein?—A. Yes, sir.

Q. Have you been sworn again in this case?—A. Yes, sir.

Q. Are you acquainted with David Shapiro?—A. Yes, sir.

Q. When did you first meet him?—A. About July, 1908.

Q. Where?—A. At the store on Halsted Street.

Q. At the store on Halsted?—A. Yes, sir.

Q. Where is it located?—A. It was formerly 560, to-day it is 1406-8-10, the new numbers, I believe.

Q. Describe that building, if you will?—A. Well, it is two stores on Halsted Street and runs back to the alley, one of the stores runs back to the alley, and one of the stores shuts off about half-way or maybe three-quarters of the way.

Q. What is there on the first floor?—A. When you enter into Halsted Street on the right hand side is the office, and in the back of the office it was formerly barrels and then tanks were put in there for retail purposes, then on the left hand side is a door, an entrance to the rectifying room, five or six tubs, four tubs were there, about 500 gallons, three tubs were about 300 or 350 apiece, located in that room, and then some barrels on the floor, and bottles and so on, that is in the next room.

Q. Look at this diagram which I show you (handing diagram to witness) and state whether or not that is a correct representation of this store of the defendant at the time you saw it?—A. Well, this is the entrance (indicating).

Q. Well, is that the picture of it?—A. Yes, sir.

Q. I just wanted that for the court; now, on this occasion in July, did you have any conversation with Mr. Shapiro?—A. Mr. Frindel took me—

Q. Did you have a conversation?—A. Yes, sir.

Q. Who was present?—A. I and Mr. Frindel and Mr. Shapiro.

Q. Now give us the conversation.—A. Mr. Frindel took me into Mr. Shapiro, it was in the middle of the room, Mr. Shapiro was not home, he was somewheres out on business and referred to his son Jacob who wrote for him, and he came back, and we went there the second or third day, I believe it was on a Friday, the second time I was there.

Q. Was Frindel there with you?—A. Yes, sir.

Q. All right now, get down to that date and give us the conversation?—A. Frindel told him that he expected to move the distillery over to Chicago and he was going to manufacture the same identical class of goods that he had been selling him previous to that, and talked general matters over and so on, which did not interest me at all, the general matters they were talking about, but as Mr. Frindel left he said, "Mr. Shapiro, Mr. Shapiro, have you got those two stamps of the barrels that I have shipped you previous from the Hudson Distilling Company?" He said, "Yes," he says, "What am I to get for it?" He says "I am going to give you ten dollars for the stamps, two stamps on packages."

Q. What were those stamps, they were tax-paid?—A. Stamps from barrels of liquor Mr. Shapiro was getting that Frindel gave him he says, "Well, we will fix it when we get here with the distillery, why we will give you credit for them." We left for the east that next following Monday or Tuesday.

Q. Now, after you left for the east did you come back again?—A. We came back on August 6th or 7th.

Q. And was that the time you opened up your distillery?—A. That was the time we started to put up the plant, yes; open up the distillery, September 3, 1909.

Q. Now, after you got here, when you opened up the distillery, did you have any conversation with the defendant?—A. When we opened up the distillery, I was with Frank Weiss and Mr. Frindel, and we established the price for the goods.

Q. Now, did the defendant do any talking that time?—A. Yes.

Q. What did he talk or say?—A. He offered for the goods \$1.80 proof gallon and return the stamps, that was the first arrangement we made with Mr. Shapiro then when the goods were delivered.

Q. What was the \$1.80, for 100 proof?—A. No, that was 150, always the price with Mr. Shapiro was at the rate of 150 proof goods.

Q. Did he buy 150 proof goods exclusively?—A. Not exclusively, but the first period it was altogether 150, the second period two-thirds 150 and about one-third 100.

Q. Was there any conversation about the number of gallons per week that he could use?—A. He said before we left here that he thinks he will be able to use between five and six hundred gallons per week.

Q. Now, did you begin to deliver goods to him?—A. The first month I did not deliver, the first month it was delivered by Mr. Frindel, and a working man that worked in the place here.

Q. When did you begin to deliver?—A. Around October, October, 1909, I have delivered, started, until April 1st.

Q. How much and what kind of goods, the quality of goods, did you deliver?—A. 150 proof brandy.

Q. And how much per month?—A. The first period it was about 1,600 or 1,800 gallons a month.

Q. And how much in all during the first period, or how much in all during the whole period of time, put it that way?—A. During the whole period of time, the lowest estimation that Shapiro has taken from the distillery was 25,000 gallons delivered of un-tax-paid goods.

Q. Now, what price did he pay for all this?—A. He started to pay \$1.80, the first he bought about two or three weeks, then he got \$1.60, that lasted a month, \$1.60,—150 proof.

Q. How much would that be 100 proof?—A. That would be about \$1.07; then he kicked on that and got it down to \$1.50 it was to be invoiced, and that was \$1.50 straight until the Easter holidays, until about the 1st of April or the 2nd or 3rd of April, 1909.

Q. And how much would that be per 100 proof?—A. That was \$1.00 a gallon 100 proof, and when we came back in 1909, the last part of July, he said he was going to take more goods from Mr. Frindel, but he would not pay more than \$1.40 for 150 proof, that was the price paid, \$1.40, for 150 proof at the time I left—and any barrel at all that had anything above 50 gallons was never paid for; if a barrel had 52 or 52½ or 53, he only paid for 50 gallons.

Q. Now, did you make any of your deliveries in barrels to Shapiro?—A. Well, I should say 99 per cent, very little jugs, he got most in barrels.

Q. Now, these barrels that you delivered contained stamps?—A. When I took them there they had stamps on, yes, sir.

Q. Did you ever have any conversation with Mr. Shapiro about taking off stamps?—A. Mr. Sha-

piro, that was the arrangements first, Mr. Shapiro took off the stamps and I took off stamps.

The COURT. The question is whether you and Shapiro ever talked about taking off stamps?

A. Yes, sir; I was there and Mr. Frindel talked with Shapiro, and the arrangement was made to take off stamps.

MR. PARKIN. What was said when that arrangement was made about taking off the stamps?

A. He said whenever the goods is delivered and the goods is emptied out from the barrel, the stamps will be taken off and returned.

Q. Did Shapiro agree to that?—A. Yes, sir.

Q. Did you ever see him yourself take off the stamps?—A. I have on a good many occasions.

Q. What did he do with them?—A. He gave them to me.

Q. Anybody else take them off?—A. Yes, sir, his son.

Q. What is his name?—A. Jake, I always called him.

Q. Anybody else?—A. Well, I would not positive say that his brother did, Ben, but he was there present on a good many occasions when the stamps were given back, taken off, and the barrels returned.

Q. Did you ever take barrels back with stamps on them?—A. I suppose a few times, the stamps were closed up that we could not take them off, I have taken barrels back with the stamps.

Q. Were they destroyed when you took them back?—A. No, sir.

Q. And they had been emptied in Shapiro's store?—A. They had been emptied in Shapiro's

store into these rectifying tanks with an electric pump.

Q. When did you make most of your deliveries to Shapiro?—A. Most all Saturday night and Sunday morning; on some occasion Sunday evening, but when we did not get enough.

Q. Was that at the request or suggestion of the defendant?—A. That was the request of David Shapiro.

Q. Now, during the middle of the week, what kind of goods did you usually deliver?—A. During the middle of the week usually delivered tax-paid goods, that is barrels that had stamps on, because they all was stamps on, and they had been used before, and after they were used on them had to be disposed of they were delivered in the middle of the week, Wednesday and Thursday generally.

Q. Did you deliver any goods which were tax-paid and which were left in the store?—A. I delivered these barrels, don't know if you would call them tax-paid or not tax-paid, but they had not a stamp on them when I left them there.

Q. Did Mr. Shapiro state why that was done?—A. He stated that he has got to have that in order to show up to the government in case they come and smell the smell of the brandy, he has got to have it for dumping purposes, he can dump it around one of those barrels, several spirit barrels, he is going to say it is all from that one or two packages with the stamps on that he got from the Illinois Distilling Company.

Q. Do you know what disposition the defendant made of these goods which were delivered to him?—A. They were emptied with an electric pump and

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put into these rectifying tubs, these four,—three, rather, three rectifying tubs, and some tubs he had there, some four tubs 500 gallons above that had stamps on, some of the goods was emptied into those tubs with the stamps on, and these rectifying tubs did not have any stamps on at all.

Q. Did you ever do any collecting?—A. I done a very little collecting, by Shapiro, because the bills would be too heavy, and Mr. Frindel would not send me there to collect.

Q. Did you at any time collect?—A. I believe a few occasions, maybe 5 per cent of the collections in that period I collected.

Q. At what price did you collect?—A. I have collected at the rate of \$1.50, and I have collected at the rate of \$1.40,—150 proof.

Q. Did the defendant himself pay you?—A. Yes, sir.

Q. How?—A. He always signed a check when he paid.

MR. PARKIN. We have those checks here, your Honor; I don't know that they are material, if your Honor cares to look at them.

Q. These deliveries of the brandy which you delivered to Shapiro, have you stated how much of it was tax paid and how much was non-tax paid?—A. Well, all the tax paid goods is in the government record here. You can tell about it more than I can, but I believe it was on the average not more than—on the average than 80 barrels, maybe 90 barrels of goods during the average of time.

Q. Now, the non-tax paid goods that you delivered, where did you get them, what part of the distillery?—A. We filled them right up direct from the tanks and delivered these barrels to Shapiro,

the stamps brought back and the barrels refilled and then delivered them again to Shapiro and often they were delivered somewhere else.

Q. What was the total of the non-tax goods he purchased?—A. Not less than 25,000 gallons for the period of time.

Cross-examination by Mr. McEWEN:

Q. When was the first delivery?—A. The first delivery was made by Mr. Frindel himself around September 7th or 8th or 9th,—somewheres around September 1st, 1909, on Saturday night.

Q. And when was the last?—A. The last that I delivered was the beginning of February, 1910.

Q. Were there other deliveries made besides what you delivered last, other deliveries made after February 10th?—A. I have left Chicago, I don't know.

Q. How often were you at the Shapiro place of business?—A. Sometimes three or four occasions a week, three or four times a week.

Q. But you were there every week?—A. Every week when I was there.

Q. Is there a season, they figure this wine and liquor dealers' business by seasons—do you know anything about that?—A. Well, there is a better season, the fall, than it would be the spring. They don't buy the spring at all.

Q. How many times did you talk with Shapiro yourself, or be present at any conversation on the subject of these goods, that is as to their crooked character; you refer to one conversation at the outset, and you refer to another; now, did you talk to him at other times?—A. Well, we spoke pretty near every week about it.

Q. What did you say on those occasions?—A. I did not have much to say, I delivered the goods and took what I wanted, what I was instructed to get, that is all I had to say to him.

Q. Did you and Shapiro ever have any trouble, that is any words or feeling?—A. I and Shapiro never had any trouble at all.

Q. Never had any angry words?—A. Nothing at all, nothing angry, but it was this summer I was there on this thing of course a dozen times after we were all under indictment; I went down there several times and I say, "Dave," I says, "this business went too far. I am here already five or six weeks. I came here to talk to every one of these liquor dealers, they should go up and compromise for themselves." And so he says, or rather his man he has got working there, that fellow with the glasses (indicating), he says, "Shapiro has got plenty of time. He will go before Judge Landis and he will put up the highest fine, \$5,000 and won't compromise himself."

Q. Who said that?—A. Shapiro was present and Mr. Biersky said it.

Q. What was the date of that conversation which you had in which you say Biersky talked?—A. I would say it was around July or the latter part of June.

Q. 1910?—A. Middle of the summer, 1910, yes.

Q. Did you have more than one talk of that kind?—A. I was there half a dozen times and maybe more.

Q. Was Mr. Biersky there all the time, or every time?—A. Not every time that he mixed in the conversation, but he was there every time.

Q. You were down at Shapiro's trying to get him to settle?—A. I went down to Shapiro, not only to Shapiro, I was in every liquor dealer in this thing, and I was down to see them and tell them to go up for themselves, and I will for myself, and everybody else says to compromise these things.

Q. You told Mr. Shapiro at the first conversation with Mr. Frindel, it was stated there at that first conversation with Mr. Shapiro that if you were to get caught, that these cases could all be settled, wasn't that part of your conversation?—

A. That I said what?

Q. Wasn't it stated there in that first talk that you had when you say Frindel was present, that if you got caught, why you could always settle with the government?—A. I don't remember.

Q. At that time, did you make any statements about your having been in trouble down east and had to settle?—A. In July I have explained to Mr. Shapiro, this July, 1910, that I did have a little difficulty with the government with regards to a certain manufacture of wine that I made, that the government fined me \$500, and I paid for it, that is I was not fined, I paid it and it was settled.

Q. Wasn't there a dispute between you and Shapiro as to the amount he should settle for?—A. There was no dispute between me and him at all, because I am not the settling man, I am not the government, I tell him to go and settle what you can.

Q. I understood you were there trying to get all these liquor dealers in this group to put up a fair share, a proper share?—A. Yes.

Q. And settle for the revenue?—A. That is what I have told every one.

Q. That is why you were there?—A. I was here six weeks in the summer time trying to see everybody.

Q. And you wanted Shapiro to pay more money than he was willing to put up?—A. I didn't want him to put up a cent, just told him to go up to the revenue office and he can compromise it, compromise it.

Q. Was there any discussion as to the number of gallons he had received?—A. We did not talk in regard to the number of gallons at all.

Q. Wasn't there a question raised as to whether you had not sold a lot of this liquor to other people that you were protecting and have protected ever since?—A. I have not protected one of them ever since.

Q. How much liquor, how much spirits were distilled in the time that you were operating there illegally?—A. We distiller altogether around 82,000 gallons, and about 10,000 or 12,000 was paid a tax for, and 70,000 not.

Q. About 70,000, and you divided that up among the different customers?—A. The first customer was David Shapiro for some time.

Q. Well, what I want to get at, to make a short cut, in order to get it them, Shapiro had to take 25,000 gallons?—A. No, sir, but this is the lowest according to my estimation what I have delivered myself.

Q. With what you have distributed to the others, that each one got, and had 25,000 for Shapiro, why that makes about 70,000 or 72,000?—A. No, sir;

that would only make about 50,000, some goods went out of town.

Q. What became of the rest?—A. I am telling you, some goods went out of town to different customers.

Q. And who were they?—A. The government has got every one of them on the list.

Q. And there were some goods went out to somebody by the name of Seltzer, wasn't there?—A. Yes, sir.

Q. Some goods went to Horwitz of St. Louis?—A. Yes, sir.

Q. And some went to Berliner of Brooklyn?—A. Yes, sir, he got around about six or eight thousand gallons.

The COURT. What did he pay for that?—A. \$1.40 Chicago.

The COURT. How much?—A. The first two weeks he paid \$1.50, then he says he can get it in New York \$1.40, he paid \$1.40 Chicago, J. Berliner.

Q. How much did he get in all?—A. He got about six or eight thousand gallons.

Q. That would be how much 100 proof?—A. That would be about 93 cents or 94.

Q. What is his name?—A. J. Berliner & Company.

Mr. McEWEN. Was there some of this liquor sold to G. Bronstein, your brother?—A. Yes, sir.

The COURT. Now, what is this that went to St. Louis, who is the St. Louis person?—A. St. Louis is Horwitz.

Q. How do you spell his name?—A. H-o-r-w-i-t-z.

Q. How much did he get?—A. I should say that he got about five or six hundred gallons during the period of time.

Q. Altogether?—A. Yes, that is entire; there is another party by the name, I can't think of his name now, he got some goods, about two or three hundred gallons.

Q. What did Horwitz pay for it?—A. Horwitz paid \$1.40 a proof gallon.

Q. 150?—A. No, he paid by 100 proof.

Q. \$1.40?—A. \$1.40.

Q. All of the time?—A. All of the time.

Q. Why did you defraud him?—A. I did not make no arrangement, Frindel made the arrangement with him in St. Louis, and I don't think he was defrauded, on \$1.40 he was not defrauded.

The COURT. Go ahead.

MR. McEWEN. And your brother G. Bronstein, where was his place of business?

A. His place of business was at Baltimore, Maryland.

Q. How much did you sell him that was delivered from that distillery to him?—A. About five or six hundred gallons during the time, he did not use much of that stuff.

Q. What price?—A. He paid \$1.40—100 proof.

Q. He paid full price?—A. \$1.40, I did not say that is full price or not, but that is the price he paid.

Q. Were the goods the same?—A. It was shipped in small kegs.

The COURT. What is the name?

A. G. Bronstein.

Q. What does G stand for?—A. Gershon.

MR. McEWEN. Then there was a Bornstein of Cleveland?

A. Yes, sir.

The COURT. Where does Gershon Bronstein have his place of business?

A. He had it in Baltimore, 1601 East Baltimore Street.

Q. 1601?—A. He has it about a year, his place of business.

The COURT. Where is he now?

A. Located in Baltimore.

Q. Whereabouts?—A. I think that is 11 or 13 Broadway.

Q. Don't you know?—A. I don't know exactly whether it is 11 or 13.

Q. Broadway?—A. Yes, sir.

Q. What is his present business?—A. He is working.

Q. Who for?—A. In the rag business.

Q. Sir?—A. Rags business.

Q. Who is his employer?—A. His father.

Q. What is his father's name?—A. Abraham.

Q. Did you have anything to do with shipping the goods to him?—A. Yes, sir.

Q. And you made him pay \$1.40?—A. I did not make the arrangements with him, the arrangements was made by Frindel in Baltimore.

Q. Did you know he was buying goods?—A. Yes, sir.

Q. Did you know he was paying \$1.40?—A. Yes, sir, I delivered it; I got the checks sometimes.

The COURT. Go ahead.

Mr. McEWEN. What?

Q. That is for 100 proof?—A. 150 proof, yes, he paid \$1.40 Chicago for the period November, December, January, February and March.

Q. On that liquor did not pay the tax?—A. No, sir.

The COURT. How much did he get?—A. He got between six and eight thousand gallons of 100 proof, not less than 6000 gallons.

Q. What is this man's name?—A. J. Berliner, 333 Hunt Avenue, Brooklyn, New York.

Q. This Cleveland man?—A. Bornstein & Son.

Q. Whose son wrote to Frindel about this?—A. It is Frindel's son.

Q. Which one?—A. Benjamin Frindel.

Q. The one that was here and tried that case?—A. Yes, sir.

Q. How do you know he did?—A. Seen his letter, and his billheads and his signature to his father.

Mr. FREEMAN. If the court remembers, that matter came out on the trial of that case.

The COURT. There was a hint at it, there was not any positive proof covering it.

Mr. PARKIN. The statement of this witness in the trial of the Frindel case was that every gallon of the liquor that went to Berliner, the way bills and bills of lading were sent to Benjamin Frindel, who at that time was in the court room defending his father, and the statement was that he collected the money on these shipments.

Mr. McEWEN. Now, take the sales to Seltzer, where was his place of business?—A. 497 Blue Island Avenue.

Q. What did you deliver to him from that distillery?—A. He was short while in the business, about two months maybe, I should say that he got maybe 1,000 gallons of that, I would not want to say positive what he got, but it was only a short while in business.

Q. What was that price on that?—A. The price to him was \$1.40—150 proof, but you could not say what the price was, because it was a loss of money, might be \$3 a gallon, would not say exactly what it costs, it was money lost at that place.

Q. Now who else got these goods?—A. A fellow in St. Paul, Frind Frindel's brother got about 1,500 gallons, a liquor dealer in Minneapolis, that is or St. Paul.

The COURT. Whose brother is this?—A. Frindel has got a brother in St. Paul or Minneapolis, or St. Paul.

Q. What is his name?—A. His name is Frindel, I don't know his first name, your Honor. I know I have delivered goods to the depot to ship it to him.

Q. St. Paul or Minneapolis?—A. Yes, sir. Then there is another liquor dealer—

Q. How much did he get?—A. He got during the period of the operation about 1500 gallons, 100 proof, about 1000 gallons, 150.

Q. At what price per gallon?—A. I don't know how much, because it was a private matter between him and his brother.

Mr. McEWEN. Did these goods pay the duty, pay the tax?—A. No, sir.

Mr. PARKIN. Did those shipments of this stuff to Frindel's brother come out of the general distillery, or out of those two tanks which Frindel had himself?—A. Came out of those two tanks he had himself.

Mr. McEWEN. Who was the man at Annapolis?—A. It was a man there, I would not swear to his name, Rosen, or Rose, whatever it is, he got a couple of hundred gallons of the stuff. Then he

closed up and would not buy no more, that was shipped on Frindel's account.

Q. How much did he pay?—A. I don't know, it was on Frindel's account.

Q. And did not pay the tax?—A. That never paid the tax.

Q. Who else received it?—A. A fellow in Connecticut, New Haven, Connecticut, by the name of Samuel, or S. Quinn, he got about 600 gallons of 100 proof at a rate of \$1.40, Chicago.

Q. Did that pay the tax?—A. No, the tax was not paid.

Q. Who else got some of that liquor?

The COURT. You say 600 gallons, 140 proof?

A. No, that was 400, \$1.40 Chicago, he paid the freight.

Q. Where is he?—A. New Haven, Connecticut.

Mr. McEWEN. Who else got some of these goods?

A. Well, then, Frindel distributed a lot of small stuff, I would not be able to tell, as I have already said, where they sold a lot of stuff I don't know where it went to.

Q. How much would that amount to, the small stuff?—A. That would be all about 50 or 75 gallons a week during the period, maybe.

Q. And that would be about a year and a half, about seventy weeks?—A. Well, the real operation of that distillery was about forty weeks.

Q. Would you say that 3,000 gallons were distributed in small packages?—A. I should say it was about that, I would not swear as to that.

Q. And that did not pay the tax?—A. Well, you can say that some of it maybe was, it came out from the retail room, we had a couple of barrels during

the period of time, a couple of barrels, he had charged himself about 1,000 gallons.

Q. Have you given the names of everybody now that you can think of who bought, I mean in addition to those men who have been indicted in this court?—A. Pretty near every name, yes, sir, as far as I can remember of.

Q. Do you recall a man by the name of Shore?—A. Yes, sir.

Q. Where is his place of business?—A. He didn't have no place of business.

Q. Did he buy some of your liquor?—A. He did, sometimes he got eight or ten gallons or five gallons.

Q. Did he ever buy by the barrel?—A. No.

Q. How much did Shore get in all?—A. Very little, I don't think it would amount to fifty gallons in the whole period of time.

Q. Did you on that occasion when you were at Shapiro's place say that if he paid you \$3,000 that you would not put him in, you would not turn State's evidence against him?—A. No, sir.

Q. When did you first tell your evidence to any officer of the United States government?—A. After I went to see each one of these liquor dealers and asked each one of them to come up to compromise, and I have lost my lungs talking to each one here, here six weeks talking to each one.

Q. Lost your lungs?—A. I was talking to each one, and I am coming up here, I am going to testify what I know about his business but it was after Shapiro was already indicted.

Q. Had you been indicted then?—A. I had been indicted, we were indicted, four liquor dealers and distillery people at that time.

Q. How much money had you put up, or had offered to put up for your share of this trouble?—

A. I have put up together with two or three parties that were working in the place \$2,000.

Q. Well, how much did you put up yourself?—

A. \$750.

Q. And you could not settle unless they all settled?—A. Well, I was not settled.

Q. Well, that finally puts you in a frame of mind where you were rather angry at Shapiro?—A. I was not angry at nobody, not angry at Shapiro to-day.

Q. Shapiro got a little angry at you on one occasion?—A. No, sir, never had any words, or any trouble with Shapiro at all.

Q. How often was the elder Shapiro away from Chicago during your knowledge?—A. Well, in the year 1909 I should say he was away about a month or six weeks selling goods on the road, and in the year 1910, no, I would say rather year 1908 and 1909, and 1910 I didn't have no business with him.

Q. He was away a good deal, wasn't he?—A. He was away during the period of those two seasons, he was away about eight or ten weeks.

Q. Well, while he was away his son ran the business?—A. Yes, sir.

Q. Jacob Shapiro?—A. Jacob Shapiro.

Q. The brother was an employee around the place?—A. The brother, an employee to my knowledge all the time.

Q. Can you now state any fact regarding the brother Benjamin that in any way brings him into this case of your own knowledge, that you can say positively?—A. That is all what I could state is that he was several times when this business went

on in there ready to assist in the work, that is all I would know about his brother.

Q. And didn't do any talking about his business?—A. He didn't do no talking.

Q. He was just a workman about the place?—A. Just assisting about the place, yes.

Q. When the elder Shapiro was away, you were in the habit of entertaining the younger Shapiro, Jacob, that is you took him out for a good time on a number of occasions, did you not?—A. We went out on several occasions, I did not take him out on any occasions.

Q. Well, you paid the expenses?—A. I did not pay any expenses, I paid mine, he come and he paid his, each paid out of his own pocket.

Q. When the older gentleman was away you always sold a good many more goods to the boy?—A. I would not say more, because he was instructed not to buy any more than Shapiro instructed him to buy, he left so many checks with his name signed to each.

Q. How do you know that?—A. That is what Jake told me.

Q. That is what the boy told you?—A. Yes.

Q. Didn't the elder Shapiro finally refuse to take any more goods of you and have nothing more to do with you because he said that you had been taking his boy down town and had been taking him around taking him and showing him a good time, on certain trips to some parts of the city the old man did not like and that created some little feeling on his part?—A. Never told me anything about that at all, the only thing Shapiro told me was in February, 1910, the government officers came to his place, and they have seized certain checks, that was about

three months before the distillery was closed, they have seized checks and h——he called up the distillery. I had been up there. He says, "Come up to see me." I go up and he told me the government officers had just taken checks away from him. He don't think it is anything because he bought plenty of goods with stamps on, the checks was paying for what he bought with stamps on, has got fictitious bills from the distillery. He got a little more goods after these checks were taken away from him. He got more goods. I was there.

Q. This is October?—A. No, sir, this is February, 1910, these checks were taken away from Shapiro about three months before the distillery was seized.

Q. Did he buy any goods after that?—A. After the checks were taken, I made several trips while I was here, I left in February, 1910.

Q. Now, how many collections did you make of Shapiro or of his son?—A. Well, several collections, I don't—I would not be positive to state how much money it would be, five, maybe ten per cent of the entire collection, because most of the collection was made by Frindel.

Q. Well, what do you say the entire collection was?—A. Entire for the whole business?

Q. Yes.—A. Should be about \$35,000 to \$40,000.

Q. About \$40,000?—A. \$35,000, maybe.

Q. And you say you collected 5 per cent?—A. Maybe 10 per cent of the collections.

Q. That would be about \$4,000 at the outside?—

A. That would be about \$4,000 that I have collected.

Q. Did you always get a check?—A. Not always.

Q. Did you sometimes get the money in cash, cur-

rency?—A. Sometimes I got cash, sometimes they gave me checks for Frindel and Weiss, they should come down and get cash for them on him, did not want checks to go to the bank. They already had a check which they got a day or so before, and on Monday used to go down to Shapiro's store and Shapiro sent down to the bank and cashed it himself, or I want to buy sugar with it or raisins or whatever it was necessary to be paid for.

Q. Did you ever cash any checks there where the checks did not represent liquor but was simply accommodation cash?—A. Some, yes, sir.

Q. How large were some of them?—A. I would not say, maybe a couple of hundred, maybe \$1,000, they were simply little checks, used to get them, and David Shapiro cashed them.

Q. You sometimes would take down a check on Baltimore to Mr. Shapiro which was dated ahead and would ask him to give you another check so that you could go and get the cash on it?—A. Yes.

Q. And he frequently did that as a matter of accommodation?—A. He done it on several occasions, maybe five or six hundred dollars during the period, or maybe a thousand dollars during the period, all small checks.

Q. Those checks were given for the Baltimore——A. No, not all the time. There was some Brooklyn, some St. Louis, some for Minneapolis checks, two or three little checks, some of them was for Baltimore checks.

Q. Now, take for instance this check which I hold in my hand (indicating), dated January 29, 1910, to the order of cash, \$64, signed "D. Shapiro, by D. F. Shapiro," and endorsed "Rosa Bronstein"

was that check in payment for liquor, or was it a cashing transaction?—A. Could not positively say, maybe it was for a check, or it was for cash, or any one of them I think I would be able to identify it, whether for cash or for checks that I gave to Shapiro.

Q. Who was Rosa Bronstein?—A. She is my wife.

Q. Was she living here in Chicago?—A. No, sir, she lives in Baltimore.

Q. And is that her signature on the back, or is that your handwriting?—A. No, sir, it is my handwriting.

Q. Now, how did you come to sign Rosa Bronstein's name on the back of that check?—A. I had power of attorney to do that.

Q. You would sign her name and then go to the bank?—A. I had power of attorney that is today at the West Side Trust Company, to sign the name.

Q. You took the check there and got the money yourself?—A. Yes, sir.

Q. That money you kept for yourself?—A. Kept it for what use I needed.

Q. Your personal use?—A. Don't say it was for personal, maybe it was for business, I had to go out and buy up—

Q. You have no way of telling now which of the transactions represents whiskey and liquor, and which represents accommodation?—A. I would not be able to identify none of these checks.

Q. Could you give us any idea of the extent of the accommodations that you received there?—A. I said up to about a thousand dollars, during the period of time.

Q. He bought some furniture of you, didn't he?—A. He bought furniture that was left by Jacob Seltzer, when Jake Seltzer left for the east, put it in storage.

Q. That was house furniture?—A. That was house furniture.

Q. Did Shapiro get any tax paid goods from you at all?—A. Yes, sir.

Q. How much?—A. I should say about 80 barrels, maybe 100, during the period of time.

Q. I mean where the tax was paid and the stamps cancelled?—A. Stamps was always cancelled, but maybe these barrels were reused a half dozen times before they got to Shapiro, re-used in his own premises, been down in somebody else's premises.

Q. But those that bear the stamp and appeared to be regular Shapiro did not pay any more for than he did for the other?—A. Shapiro paid for that goods \$1.80 with the tax and all, that means \$1.20 per 100 proof, with the stamp and all.

Q. You recall his getting nine barrels from that distillery where he had to go and get the stamp himself?—A. That was when I was down east in April or May, maybe it was April, 1909.

Q. What did he pay for that liquor?—A. I have no idea what he paid for those barrels at all.

Q. When you fix the amount of 25,000 gallons, how do you fix it, have you any goods or any papers or any memoranda?—A. I have no books only what I delivered, that I could say.

Q. Well, you didn't deliver all of that, did you?—A. I delivered about 90 per cent of the goods to Shapiro.

Q. How do you fix it in your memory, by the week or by the month or by the day?—A. By the

week, by the month, by the week, I have said the first period, not less than about 400 gallons, probably above the second period.

Q. How many gallons per week?—A. 400 gallons per week, and the second period about 500, a little above, I would not say much above, but not much less than 500 gallons of 100 proof.

Q. Well, how many weeks?—A. Well, you can figure September, October, November, December, January, February and March the first period; second period, you can start August, August and September you don't have to figure October because we did not work that time much, and we did not deliver; November and December you can figure it out easy.

Q. How many weeks do you charge up against Shapiro for delivering?—A. September, October, November, December, January, February, March—seven months, that would be twenty-eight weeks, 400 gallons, then twenty-four weeks 500 gallons, that is the least estimation that I have delivered myself.

Q. You figure 48 weeks' business with Shapiro?—A. That would be 52 weeks.

Q. 52 weeks?—A. Yes, sir; that is right.

Q. I had it wrong. So you figure 52 weeks against Shapiro when you are delivering to him, and you figure 40 when you are figuring on how long you are running the distillery?—A. What I mean we did not run much, why Shapiro got it all, and we kept on running, if we ran more other dealers got it; then Shapiro started first to buy ahead of any liquor dealer in the city.

Q. Now, did you ever see either of the Shapiros take a stamp off a barrel?—A. Yes, sir;

Q. Which one?—A. Several occasions, the old gentleman did, most occasions his son did. He stayed at the other store, it is two stairs up, Mr. David Shapiro stood in front of the store on Halsted street looking out for people passing, while I and his son went in the other room, the other store attending to the work.

Q. Did you take off any stamps?—A. I did.

Q. Do you know why it was that the Shapiros took off stamps?—A. There was——

Q. Instead of you?—A. On some occasions I did, one some occasions they did when I loaded on the barrels while they took off the stamps.

Q. Was it part of the bargain that they should help you take off stamps?—A. The bargain was that the stamps should be taken back, it was no bargain to help, it was no bargain, I am supposed to help dump the goods, but I helped them while I waited in order to get away quick.

Q. Did you ever get any checks from Jacob Shapiro which he signed himself?—A. Yes, sir, I think I did.

Q. You said a little while ago that Jacob Shapiro could only buy so much because he had only so much signed checks with him?—A. Yes, sir.

Q. Now, did he ever give you checks that he signed himself?—A. He give me checks that he countersigned, what I would David Shapiro's name on it on top and his name at the bottom.

Q. Were those checks filled out?—A. They were not.

Q. Then he could buy to the limit of the bank account, as a matter of fact?—A. I suppose so.

Q. Then you did not know what the bank account was?—A. Never did, no.

Q. Now, what official of the United States Government did you first tell your story to?—A. The gentleman that sits right there, Mr. Freeman [indicating].

Q. Mr. Freeman?—A. Yes, sir.

Q. You went in yourself, voluntarily?—A. I came voluntarily up to the old gentleman here, Colonel Ingram, and he says, "Why, whatever you have got to say, you have to give it to the District Attorney of the United States."

Q. Yes.—A. And I went up and saw Mr. Freeman.

Q. Did you have a lawyer at that time?—A. I did.

Q. Who was your lawyer?—A. Peter Sissman was my lawyer.

Q. Was he along with you at the time?—A. No, sir.

Q. Did he ever go with you to Mr. Freeman's office?—A. Not with me that I could recollect; once was in Freeman's office and he happened to come in on some business.

Q. At that time that you talked to Mr. Freeman, the first time, did you tell him the complete story as you understand it?—A. I have told him everything that I know.

The COURT. The first time, did you tell him everything the first time?—A. I did.

Mr. McEWEN. Did you tell him then about your brother buying some of these goods?—A. I did.

Q. And all the men named in the indictment here in this court that you have testified against before the grand jury?—A. I have told him pretty near I should say everything that it is on the paper.

Q. And you named Seltzer?—A. I have named Seltzer.

Q. Horwitz?—A. Horwitz.

Q. Bronstein?—A. Yes, sir.

Q. Berliner?—A. Yes, sir.

Q. Bornstein?—A. Yes, sir.

Q. Frindel's brother?—A. Yes, sir.

Q. The man in Annapolis?—A. Well, I could name his name, I don't know him.

Q. Well, Rose something.—A. I shipped goods to him.

Q. You told him about the man in Annapolis?—

A. I did, could not tell his name.

Q. Tell him about the man in New Haven?—A. I did.

Q. About Shore?—A. Yes, sir.

Q. Who were the operators of the Illinois Fruit Distillery?—A. Frindel and I—— What do you mean by the operators, the workmen inside?

Q. No, I mean the managers?—A. Frindel and I and Frank Weiss.

Q. Anybody else interested in it?—A. Different men was interested in it, Jacob Seltzer for a little while, then he got out, it was no profit, had to get out, but he got out of business and got back east, for he lost his money here.

Q. And you say you were equal partners?—A. No, sir.

Q. How did you have it arranged as to division?—A. We arranged with a salary for I and Frank Weiss and a commission of the profits.

Q. What salary did you get?—A. Got \$25 a week and 5 per cent of the interest.

Q. And Weiss got how much?—A. Same as I got.

Q. And who had the money up in the distillery, whose capital was it?—A. What?

Q. Who furnished the capital for the distillery, whose distillery was it?—A. The distillery at the beginning was my distillery.

Q. Was whose?—A. Was mine, but I did not get paid for that; that is the reason I remained in Chicago with it; the balance of the working capital, Mr. Frindel had capital, advanced in fixing up things and all, and when the operation started I borrowed \$300 from Mr. Rosenstein, Harry Rosenstein on 12th street, started it up, and when goods was sold it was the cash transaction, so it was enough to operate it.

Q. Well, did you get any money for your interest in the distillery, your ownership of it?—A. I did get paid for it, yes.

Q. How much did you get?—A. \$1500 for the distillery.

Q. Who paid that to you?—A. Frindel.

Q. And Frindel was the bigger owner of it?—A. Frindel was the operating owner of it, then he remained altogether himself.

Q. Well, did you ever pay Frindel any salary out of the business?—A. Frindel got a week, he got a salary against our \$25, he got \$40, and the next week he got—refused to do that, and got himself a tank; what I mean is this: He furnished capital to buy the materials for that tank goods, and he got all the goods for himself.

Q. And did you at any time have an arrangement by which Frindel was to be your employee in fact, but appear to be the owner, simply use his name?—A. Never had any arrangement with him at that time at all.

Q. At any time?—A. No.

Q. You all came from Baltimore here together?—

A. The first time I came—Frindel—alone, Frindel has already been here once or twice, he wants me over here to look over the city of Chicago and see if I will agree to move with him, but when Frindel got here with me and I looked over the scene and I have seen from this business he is making with David Shapiro I refused to come with him in partnership, and made me sell my place. The place was sold by me in Baltimore for \$2,000, the man did not pay a dollar on the place because I had some mortgages on myself, so he says I am going to pay you when these goods is on the station, then he delivered it, he paid in full, took the machinery apart and shipped it to Chicago, so I came to Chicago.

Q. You all started?—A. Started, I came here, Frank Weiss came here and Frindel came.

Q. You had been operating together in the east?—A. No, sir; I had been operating in the east together with nobody, myself individually.

Mr. McEWEN. I think that is all.

Redirect examination by Mr. PARKIN:

Q. How many pounds of sugar approximately were used in this distillery during the time it was run?—A. Close to a million pounds, over 900,000 pounds.

Q. And how many pounds are required to make one gallon of brandy?—A. About 12 pounds of that corn product sugar, it would take 10 pounds of the other kind of sugar according to measures.

Q. What kind did you use?—A. Used corn sugar made by the Corn Products Refining Company.

Q. How much other materials did you use there during the period?—A. We have used a little raised

seeds, and a little raisins and some prunes and some figs.

Q. About how much of them altogether?—A. I would not positive state.

Q. A thousand pounds?—A. No, we used more than that.

Q. Ten thousand?—A. More than ten thousand.

Q. Twenty-five?—A. Maybe over twenty-five we used there.

Q. Well, would you say twenty-five now, how much brandy would that 25,000 pounds of seeds, prunes and raisins make?—A. Now, that is what I wanted to explain; the raisin seeds do not give much brandy, in fact I don't believe they would give five gallons to a ton, but they were bought for a cover on top when the sugar was up in the vat, because the raisin seeds swims up on top and it makes a cover for them.

Q. They were bought——A. Just bought for this purpose for the distillery, maybe would not give five gallons.

Q. They were put there to fool the revenue officers?—A. Yes, sir.

Q. Now, how much actual fruit brandy was made there out of fruits?—A. Fruits alone?

Q. Yes.—A. I only remember one occasion Frindel made some and took it home, some schlivorwicz, that is the only pure fruit brandy that was made, that was taken home in small kegs, six or eight kegs.

Q. Was there 10,000 gallons of actual fruit brandy made there during the period?—A. I do not think it was, don't think it would make that much.

Q. Five?—A. Possibly about five, I would not state that either as a fact, I would not state it.

Q. Now, these barrels of brandy containing revenue stamps which you sold to Mr. Shapiro, did he report or make any statement to you about reporting certain ones to the government?—A. What say, sir?

Q. Did Shapiro ever tell you about which ones he would report to the government?—A. Well, these stamps were left there.

Q. On his form 52?—A. On the regular government form.

Q. Did he ever talk to you about that, did he ever tell you which barrels he would put on there?—

A. No, sir, did not specify the barrels; he wanted it because some of it he entered for retail purposes, that he did not have—maybe he did have to report that, but I don't know, I suppose he did.

The COURT. The question is whether he told you.

A. He didn't tell me, did not specify what barrels he is going to put on there.

Mr. PARKIN. I think that is all, your Honor.

Mr. McEWEN. That is all.

The COURT. You say that some of these stamps were taken off by you and Benjamin Shapiro?

A. Not Benjamin. Jake, the son.

Mr. McEWEN. Jacob or David?

The COURT. Sir?

Mr. McEWEN. Do you mean Jacob?

The COURT. What has he got to do with it?

The WITNESS. Benjamin?

The COURT. Yes.

A. The only thing I would know he was there when the things was done, when the business was done, that is what I would know about it.

The COURT. Where was he when the business was done?

A. In the rectifying room.

Q. What was done in the rectifying room? On some occasions when Benjamin was in the rectifying room?—A. A hose about an inch and three-quarters was put into the barrel, and one end of the hose was put into these tubs, and the electric pump started, and these barrels were emptied, then the stamps were taken off after the barrel was emptied, and he helped to roll up some empty barrels and put on the wagon, he was in while I was working there, that is all I know about Benjamin Shapiro.

Mr. McEWEN. You don't claim that you could remember any particular thing while Benjamin was there?

A. I didn't pay no attention to him at all.

Q. So far as you ever observed, he was simply a workman around the place?—A. So far as I have observed.

Q. He took orders, moved liquor, moved barrels, whatever any workman might do?—A. Rolling barrels, filling and labeling bottles.

Q. And selling goods in the store?—A. Selling goods sometimes to a peddler when he comes in the store.

Mr. PARKIN. Was he there when you had this conversation about removing stamps?

A. No, sir, not to my knowledge; in fact, I did not make the arrangement with Shapiro. I was only there when the arrangements was made, but I don't think Benjamin was there at all.

Q. Was Mr. Biersky there when these stamps were taken off?—A. I could not positive say, but the last time when I left I should say he was in the place.

Q. Had you ever seen him there?—A. I have seen him in the place but would not say I ever saw him taking off any stamps.

Mr. McEWEN. Do you know what Biersky does, what he does?

A. What say?

Q. Do you know what work he does there?—A. Today he tells me he is a half partner.

The COURT. What did you see him do?

A. I have not saw him do anything while there working for that distillery.

Mr. McEWEN. After Shapiro got in this scrape he wanted a bookkeeper, somebody to run his business?

A. After—

Q. And he got Biersky to straighten up his papers and make his business run like an American business?—A. I have not any conversation with David Shapiro and Biersky, that is what I supposed he was doing there.

Mr. PARKIN. In other words, Biersky was not there during the period?—A. I have seen him during the period of 1910.

Q. He was not employed?—A. I don't think he was employed.

The COURT. You say he told you he owned the business?

A. Lately, in July.

Q. What July?—A. 1910.

Q. What did he say?—A. After he got into trouble, he says he has a partner to the business, he has give his boy a partner in the business, he is going to run it.

The COURT. Was there any indictment of Biersky?

Mr. McEWEN. No, there is no indictment. The old gentleman turned this business over to his son, and that will probably be explained before we get through.

FRANK WEISS, called as a witness on behalf of the Government, having been first duly sworn, was examined by Mr. Parkin and testified on direct examination as follows:

Q. Are you the Frank Weiss of New York who was connected with the Illinois Fruit Distilling Company?—A. Yes, sir.

Q. You have testified heretofore in some of these cases?—A. Yes, sir.

Q. You are under indictment?—A. Yes, sir.

Q. Do you know the defendant David Shapiro?—A. Yes, sir.

Q. When did you first meet him?—A. I came here to Chicago, I can't say exactly, I guess it was about August or September when the machine—

Q. What year?—A. 1908, when the machinery came over so Bronstein took me in and introduced me to Mr. Shapiro and asked him whether he can direct us to a hotel, some rooms, and said he was in for two or three days, and asked him where we can get some wagons to take down the machine.

Q. Did he inform you?—A. What is it? Yes, sir.

Q. Now, did you ever make any deliveries of the brandies from the distillery to Mr. Shapiro?—A. I delivered only once.

Q. When was that?—A. It was December, 1910.

Q. What was the brandy contained in—you mean the summer of 1910?—A. I mean December, 1910, yes.

Q. December, 1910?—A. December, 1910.

Q. You mean December—

The COURT. Go back to the period covered by the indictment.

A. December, 1910.

The COURT. This is 1911, was it last month you did this?

A. Yes, sir, I am talking about December, 1909.

Mr. PARKIN: Q. Did you take kegs, barrels or what?

A. I delivered four barrels.

Q. Did they have stamps?—A. Yes, sir.

Q. Who was there when you got to the place?—

A. Mr. Shapiro was there.

Q. That is David Shapiro the defendant?—A. David Shapiro's son.

Q. His son Jacob?—A. Yes, sir.

Q. Now, what did you do with those barrels?—

A. I backed the wagon there in the alley and took them down and they emptied them and I took them back.

Q. Did you have the stamps on each of the barrels when you took them back?—A. No, sir, the stamps was off.

Q. Who took the stamps off?—A. I guess Jacob Shapiro.

Q. You say you guess. Do you remember?—A. Jacob, yes, sir.

Q. Where was David Shapiro when you delivered the stuff?—A. He was at the door.

Q. Did he take the stamps off?—A. I could not say.

Q. What was he doing at the door?—A. He was standing at the door looking outside.

Q. And what was he looking out for?—A. Maybe somebody will come in.

Q. Now, did either Jacob or David Shapiro ever come to the distillery?—A. I did not see David Shapiro up in the distillery, Jake was once or twice.

Q. Did you hear him have any conversation with yourself or Mr. Frindel?—A. Yes, he was asking for goods.

Q. What else did he say?—A. That is all.

Q. Did he say anything else about selling to retainers?—A. Well, what was in the presence, in his store, Mr. Shapiro says, that was the next period, it was in 1909, around July, he says that he will take more goods, and we should not sell to small liquor detailers and the retailers, and he says he will take more, two or three barrels.

Q. Now, do you know at what price David Shapiro paid for this brandy?—A. Well, the first period when I came here, because I came here to put up the machinery, then I left for the east, I went home; then they brought me back, so they told me.

The COURT. Who told you?

A. Frindel and Max.

Q. Don't want that at all.—A. I came back.

The COURT. Did you have any talk with Shapiro about the price?

A. The first time, no sir.

Q. The second time?—A. The second time, that was \$1.50 when I came here I found the price \$1.50.

Q. How did you find out?—A. I seen the collections.

Q. Did you make the collections?—A. I made them sometimes.

Mr. PARKIN. What price did you collect at?—A. \$1.50.

Q. How much?—A. \$1.50.

Q. For what proof?—A. For 150 proof, it was the first period.

Q. Now, did you ever collect in the second period?—A. Yes, sir.

Q. How much did you collect at that?—A. \$1.40—150 proof.

Q. Did you carry bills with you?—A. No, sir.

Q. Did you carry these bills along with you when you delivered these goods?—A. No, sir; not bills at all.

Q. Now, did you ever remember talking with David Shapiro over the telephone at the distillery?—A. Yes, sir; that was in 1909.

Q. During what month?—A. It was about in December.

Q. What was Shapiro saying?—A. Max left and——

Q. Where was Max at that time?—A. Max was out there by Shapiro delivering goods.

Q. Had Max left the distillery before the telephone rang?—A. Yes, sir; he had left.

Q. What did he have with him?—A. He had four or five barrels of goods.

Q. No, the telephone rang?—A. The telephone rang.

Q. Did you answer the telephone?—A. Yes, sir.

Q. Who was there?—A. Shapiro.

Q. What did he say?—A. He says, "Has Max left the place already? I says "Yes, he went out with four or five barrels already." He says, "Well, go and call him back, because there is somebody watching in front and I don't know the man."

Q. Now then, what happened after your conversation with Shapiro?—A. I took the car then

and I took an Archer avenue car and transferred on Halsted to meet Max and bring him back with the goods.

Q. Did you meet Max on the road?—A. No, sir, Max was just taking down the barrels when I caught him there.

Q. At Shapiro's place?—A. At Shapiro's place in the back, and I came in and saw David Shapiro and he told me I shall go and see that man.

Q. Now, just a minute, you did not meet Max on the road?—A. No, sir.

Q. He had already got to Shapiro's place?—A. And the barrels down.

Q. Answer my question.—A. Yes, sir.

Q. Where were the barrels?—A. The barrels was in the back of the store.

Q. In the store?—A. Yes, sir.

Q. Rolled from the wagon?—A. Rolled from the wagon——

Q. Did Shapiro then say anything about the man watching?—A. Shapiro told me I shall go out and see who that man is that was on the corner, right there by the saloon on Halsted, so I walked out and I looked on the man and I did not recognize the man. I says, "I don't know that man," and after I came in I says "I don't know that man" and after a couple of minutes that man walked away from there, so that evening he refused to give me back a barrel, didn't empty them at all.

Q. Did you leave the barrels there?—A. Yes, sir.

Q. Do you know when the barrels were got?—

A. In the morning.

The COURT. What morning?

A. Next morning.

Mr. PARKIN. Did Shapiro ever call you up other days on the telephone?

A. A couple of times.

Q. What was the conversation?—A. Send him goods.

Q. Do you remember anything else?—A. No.

Q. Were those goods that you delivered tax paid?—A. Those barrels, no, sir; it was refilled.

Q. What is that?—A. It was refilled again.

Cross-examination by Mr. McEWEN:

Q. How much money did you collect of the Shapiro's?—A. I can't say how much I collected, I collected—

Q. Have you any idea at all whether it was a thousand or five thousand?—A. No, sir; I collected more than that.

Q. Did you ever get any check cashed?—A. Have I had checks cashed?

Q. By which you would deliver to Mr. Shapiro and took away a Baltimore check, got a check back from him that you could go over to the bank and get the money on?—A. If I had a check from Mr. Shapiro—

Q. Did you ever get any money from Mr. Shapiro that was not pay for liquor, that was accommodation?—A. Don't remember, probably yes.

Q. How?—A. Maybe yes, once or twice, I don't remember exactly.

Q. Did you ever go down there and take a check on a Baltimore bank and ask him to give you a check that you could take over to the bank and get the money on so as to cash the Baltimore check?—A. I guess yes once or twice.

Q. What were those Baltimore checks for? How did you come to have them?—A. How I had Baltimore checks?

Q. Yes.—A. I did not have no Baltimore checks.

Q. You never had a Baltimore check?—A. No.

Q. Did you ever send any money to Baltimore in checks that you got from Shapiro?—A. Did I—Oh, I sent one or two.

Q. What were those checks for?—A. Well, it was for the goods.

Q. For goods, what goods?—A. If I have to send money, I have to send a check, send money.

Q. Were you buying goods in Baltimore?—A. No, sir.

Q. What were you sending checks to Baltimore for?—A. I remember I sent one check, I sent.

Q. What was that check for?—A. I don't remember.

The COURT. Who to?

A. I sent it to my wife, maybe one check.

Mr. McEWEN. Just one check?—A. Yes.

Q. Did Shapiro cash many checks for you, that is where it did not mean anything about whiskey, but just accommodation?—A. Cashed maybe one or two or three checks, I don't remember. He cashed some checks.

Q. But you would not say it was more than three?—A. I could not remember, maybe.

Q. What name did you use in those things?—A. What is it.

Q. What name did you go by this time?—A. What name I used?

Q. Yes, what was the name you used?—A. My name.

Q. Yes.—A. My name is Frank Weiss.

The COURT. What name did you use at the time of these transactions?

A. Frank Weiss.

Judge McEWEN. Did you ever use the name Frank Weissman?—A. No, sir, I did not use that name, but Shapiro make the name.

Q. He did that?—A. Yes, sir, Shapiro gave checks, wrote the name sometimes wrote it Weissman, sometimes wrote cash, and many times he did not give checks at all, in cash.

Q. And you signed your name on the check?—A. Lots of times Shapiro took the checks to the bank and went to the bank himself and took the cash.

Q. And in cashing these you signed Frank Weissman?—A. I signed "F. Weiss," I signed.

Q. Never signed them "Frank Weissman?"—A. No, sir.

Q. Well, just refresh your recollection, will you look at the check of March 4th, 1909, signed "D. Shapiro" and look at the endorsement on the back one Frank Weissman, the other Frank Weiss.—A. That is not my endorsement.

Q. It is not your endorsement?—A. No, sir.

Q. Whose is it?—A. I guess it is Bronstein's.

Q. Did you give Bronstein power of attorney so that he could go over to the bank and cash your check?—A. No, I didn't give him, he did not cash them, he deposited, not my signature.

Q. What banks did you do business with?—A. Well, the first time I done it with the Casper Bank.

Q. And then after that where did you do business?—A. After that Max Bronstein done the business with the West Side and with the Hamilton Bank.

Q. Did you know all about the deliveries from the Illinois Fruit Distillery Company?—A. I think so.

Q. You knew your customers?—A. Yes, sir.

Q. Your customers included all these gentlemen who have been indicted in these different litigations?—A. Yes, sir.

Q. And this series of prosecutions?—A. Yes, sir.

Q. Include anybody else, was anybody else a customer besides these people that have been indicted?—A. Yes, some more from outside.

Q. Some of them buy goods that here not tax paid?—A. Yes, sir.

Q. Did they know it?—A. Certainly.

Q. How many customers were there of that kind?—A. Berliner was one.

The COURT. Are there any more in this town?—A. No sir.

The COURT. Nobody in this town or in this neighborhood or in this State that got any of this stuff that was not tax paid that was not indicted.

A. No sir, all indicted.

Judge McEWEN. Where is Seltzer?

A. Seltzer is down east.

Q. He was in business here?—A. He was about a couple of weeks.

Q. And he bought some goods here?—A. Very small, very little.

Q. And the goods were delivered here, right here in Chicago?—A. Yes, sir.

Q. To Seltzer?—A. Yes, sir.

Q. Goods that were not tax paid?—A. Yes, sir.

Q. Seltzer had been in business there with you before?—A. He was before, yes sir, for a short while, and the man lost his money and went back to the east.

Q. When did you first make a statement regarding this case to anybody, anybody connected with the Government?—A. When I came here this summer.

Q. Did you come along with Bronstein when he went down to the revenue offices?—A. I went with Bronstein.

Q. You were together?—A. Yes, sir.

Q. And you saw what man in the revenue office?—A. Saw Colonel Ingram and he sent me up to Mr. Freeman.

Q. And there you talked about what you knew?—A. I told everything what I know.

Q. All you know, everybody that was connected with it who bought illicit goods from you, crooked goods?—A. Told them about everything.

Q. Included everybody?—A. Everybody.

Q. Did you go over to see Shapiro about getting Shapiro and the rest of them to go and settle this case?—A. I was once.

Q. Bronstein along with you?—A. I was with Mr. Bronstein, yes sir.

Q. Who did the talking then?—A. Bronstein tells Mr. Shapiro he shall go and compromise, Shapiro says that he ain't, and why is he going to compromise, that is it.

Q. Said he wasn't going to compromise?—A. No, he didn't say he wasn't, why he is going to compromise.

Q. Wasn't the real trouble you wanted Shapiro to stand for about 25,000 gallons so as to make up for all the different sales that had been made that you did not want to tell about?—A. Who?

Q. Well, I will put it this way, did not you have some dispute with Shapiro as to how much he should settle for?—A. No sir.

Q. Wasn't a word?—A. No sir.

Q. Didn't talk money or amount at all?—A. No sir.

Q. You didn't tell Shapiro, "You ought to put up so much?"—A. I didn't say anything.

Q. Well, did Bronstein say, "Shapiro, you want to put up so much?"—A. He only say, "You shall go better and compromise."

Q. Meaning that a compromise among these dealers had to be made by all of them, didn't you?—A. I don't know that.

Q. Did you have your compromise arranged, did you have a compromise fixed up?—A. At that time?

Q. Yes.—A. I don't remember.

Q. How?—A. I don't recollect, after that or before that, I don't recollect.

Q. Well, did you have a compromise arranged at any time?—A. I went with Bronstein and my brother and we signed a compromise, \$2,000, we did not mention at all——

Q. How much of that did you put up?—A. I put up \$1,000.

Q. And how much of it did Bronstein put up?—A. \$750.

Q. Who put up the rest?—A. My brother, \$250.

Q. And you had that up for a compromise?—A. Yes sir.

Q. Did you put it up with the rest of the dealers?—A. No sir.

Q. Put it up separately?—A. Yes sir.

Q. Did you ever get word that you could not compromise, that the compromise would not be accepted?—A. I don't know if it is accepted.

The COURT. Did they ever turn you down?

A. They didn't turn me down.

The COURT. Did you ever hear they turned you down?

A. No sir.

The COURT. Or that they had not turned you down?

A. I did not hear anything.

Judge McEWEN. Why did you go down to Colonel Ingram's office.

A. What is it?

Q. Why did you go to Colonel Ingram?—A. Well, the first time——

Q. Yes, I mean and tell him these things and then he turns you over to Mr. Freeman.—A. Why, Colonel Ingram is the chief agent.

Q. Why did you go down there?—A. Well, because he is the boss; he is for the revenue office.

Q. Well, at that time had you made up your mind you could not settle with the Government?—A. No sir, I had made up any mind, I went to Colonel Ingram, I says, "We want to tell everything," and we goes, he sends us up to Freeman and we told everything to Mr. Freeman.

Q. What was your idea in telling him about the case—A. Well, we seen everything is discovered, and we testified everything.

Q. Did you expect to get any advantage out of that?—A. No sir.

Q. Was it because of conscience that you went down?—A. What is it?

Mr. McEWEN. Never mind; that is all.

The COURT. I want to know the frame of mind this man is in. Did you expect me to dispose of your case with out paying any attention to what you have said here?

A. No sir.

The COURT. What is your frame of mind about it?

A. I don't know anything, I have to stand trial.

The COURT. You don't expect me to take into consideration in disposing of your case the fact that you have testified in all these cases?

A. No sir.

The COURT. I will say to you that I have been forced to the conclusion from what these two gentlemen have said and the way they have acted that they are in a peculiar frame of mind on this matter. I never saw anything like it. Call your next. Come in at two o'clock.

(Whereupon a recess was taken until 2:00 o'clock P. M., of the same day.)

United States *vs.* Shapiro.

JANUARY 20, A. D., 1911.—2:00 o'clock P. M.

Met pursuant to recess.

Present as before.

The COURT. Proceed, gentlemen.

JOHN MULLIN, called as a witness on behalf of the United States, having been first duly sworn, was examined by Mr. Parkin, and testified as follows:

Q. You are the John Mullin who has testified in these cases heretofore?—A. Yes, sir.

Q. You are employed at the Illinois Fruit Distilling Company?—A. Yes, sir.

Q. Do you know the defendant Shapiro?—A. No, sir.

Q. Do you know David Shapiro?—Yes, sir.

Q. State whether or not you have delivered brandy from the Illinois Fruit Distilling Company to the place of business of Jacob Shapiro?—A. Yes, sir.

Q. How many times?—A. I went once by myself and the rest with Mr. Bronstein, about five or six times.

Q. And what did you deliver when you were there alone?—A. Three barrels.

Q. What was done with the liquor?—A. They pumped it up in tanks by an electric machine.

Q. How did you get it there, in jugs or barrels?—A. Barrels.

Q. Did they have stamps?—Yes, sir.

Q. After you got there it was pumped out?—A. Yes, sir.

Q. Where was it placed?—A. I rolled them in the back way, into the room on the side and the tanks were setting in that room and they put a rubber hose up top in this tank and a rubber hose into the bung of the barrel, then they started the electric machine and pumped it out into the tank there.

Q. After the barrels were emptied, was there anything done with the barrels?—A. Taken back to the distillery.

Q. Was anything done with the stamps?—A. Yes, sir. Jake took them off and give them to me and I took them back.

Q. Who took them off?—A. Jake, the fellow they called Jake.

Q. Jake Shapiro?—Yes, sir.

Q. Now, on the occasions when you went there with Bronstein, what did you take to the store?—A. Barrels and jugs.

Q. And was the defendant, Shapiro, there at that time?—A. I never seen the old gentleman in my life before I seen him around here.

Q. Was Jake there?—A. Yes, sir.

Q. And what did you do with those barrels and jugs upon these different occasions?—A. Pumped them up in the same tank.

Q. Was anything done with the barrels and the stamps?—A. Max and them taken them off.

Q. Who took them off?—A. Bronstein and Jake.

Q. Did you take any off?—A. No sir.

Q. Did you take any of them back to the distillery?—A. Yes sir.

Q. Who gave them to you?—A. I taken them from Jake and Jake give me for them three barrels.

Q. I mean now for the times Mr. Bronstein was with you?—A. He took them himself back.

Q. They didn't hand them to you?—A. No sir.

Q. They did hand them to Bronstein?—A. Yes sir.

Q. Do you remember how many stamps?—A. I do not, no sir.

Q. Well, a dozen stamps?—A. I would not—I think about four different times with Bronstein, once myself.

Q. Four times to Bronstein?—A. Four or five.

Q. Now, upon those four or five times when you were there with Bronstein, were there one or more stamps removed from barrels by Jake Shapiro?—A. Yes sir.

Q. Now, how many stamps?—A. Him and Max taken them off between them.

Q. How many?—A. Well, three or four, when we took them down four barrels, two barrels or three barrels.

Q. Would there be at least ten stamps taken off by anybody?—A. Altogether?

Q. Yes.—A. Yes.

Q. By Jake Shapiro?—A. I don't know by Jake, by all of them.

Q. Well, partly by Jake and partly by Max?
A. Yes sir.

Q. And those stamps, did you ever use them again after that?—A. Yes sir.

Q. Where were they placed?—A. Back on the barrels.

Q. In the distillery?—A. Yes sir.

Q. Now, where did the brandy that you delivered at Shapiro's place come from?—A. The distillery.

Q. Which portion of the distillery?—A. They have got a room there called the storage room, come out of there.

Q. Did they come from that place every time that you took them?—A. Yes sir.

Q. Now, the times that you went with Bronstein, where did they come from?—A. Out of the same room.

Q. Prior to Jacob Shapiro and Bronstein removing the stamps, were the stamps torn and obliterated, destroyed?—A. He pulled them out with a tack puller, pulled the tacks, they were old stamps.

Q. Did they destroy the stamp or tear it?—A. No sir.

Q. It was in the same form as when it was purchased from the Government?—A. Yes sir, two tack holes in, that is all I seen.

Cross-examination by Judge McEWEN:

Q. Are you under indictment?—A. No sir.

Q. How much wages did you get for driving?—
A. \$15 a week.

Q. How much?—A. Fifteen a week.

Q. Is that the regular wage, or is it a little more?—A. That is all.

Q. I mean, is that more than the going rate, what other drivers get?—A. I don't know what the others get.

Q. You were from Baltimore?—A. I was.

Q. And they brought you out here because you were a good driver, or a good driver for that kind of work?—A. I don't know—

Q. When did you make your first statement to the District Attorney?—A. I don't know, about three or four weeks, I guess.

Q. Three or four weeks ago—did you go there yourself or did they send for you?—A. They sent for me.

Q. Did you ever see the brother of David Shapiro around?—A. No sir.

Q. Benjamin Shapiro?—A. No sir, don't know him.

JUDGE McEWEN. That is all.

MR. PARKIN. If the Court please, there are a number of documents here that were filed by the defendant whose signature is attached, showing the verdict to show the receipt of distilled spirits. I want to have these in evidence. I can make the proof formal if you wish to have it.

JUDGE McEWEN. No. They may be considered as identified, subject to correction by either side.

MR. PARKIN. Then I will reserve the reading of this until later. I think that is all that we care to put in, your Honor. The Government rests.

JUDGE McEWEN. I may say that we had a considerable number of character witnesses, but they of course are people with whom Shapiro did business and I prefer to put the defendant on the stand

and let the Court judge his character by the story that he tells.

(And thereupon the defendant to maintain the issues on his part introduced the following evidence:)

JUDGE McEWEN. You may take the stand, Mr. Shapiro.

DAVID SHAPIRO, the defendant herein, appearing as a witness in his own behalf, having been first duly sworn, was examined in chief by Mr. McEwen and testified as follows:

Q. You may state your full name.—A. David Shapiro.

Q. And you live where?—A. 1255 South Lawn-dale.

Q. How old a man are you?—A. 48.

Q. Where were you born?—A. In Russia.

Q. What place or province?—A. Smolensk.

Q. That is a part of Russia proper?—A. Yes.

Q. How old were you when you came to this country?—A. 23 years ago.

Q. Were you married when you came to this country?—A. Yes sir.

Q. What was your occupation in the old country?—A. In the old country in my youth I was in a distillery with my uncle and then I was in the lumber business.

Q. You worked for your uncle in the distillery business?—A. Yes.

Q. Distilling whiskies, I suppose?—A. Yes.

Q. And how long were you there?—A. About three years.

Q. And that is where you learned the business?—A. Yes.

Q. They have a revenue law in Russia, I suppose, they pay tax in Russia on spirits?—A. Yes sir, sure, same as here.

Q. When you landed in this country, what business did you go into?—A. I went in wine business, wine and whiskey business.

Q. How many years have you been in the wine and whiskey business?—A. Altogether 19 years.

Q. Were you ever a distiller in this country?—A. Yes sir.

Q. Whereabouts?—A. On Taylor Street, 400 Taylor Street.

Q. In this city?—A. In this city, yes sir.

Q. How long were you in that business?—A. Six months.

Q. What time was that, what year?—A. I can't remember exactly the year, but I believe it was in 1898 and 1899.

Q. And you quit that business?—A. Yes sir.

Q. Where did you first meet any of the parties in this trouble, Bronstein and White?—A. I met them in June, 1908.

Q. Had you known them before that time?—A. No.

Q. Bronstein, and where did you meet him?—A. In my store.

Q. Who was with him, if anyone?—A. He came in, first came in a fellow by the name of Mr. Shaw and he told me that such a man would come here with whiskey, well, the beginning was Mr. Frindel come in the store and left his sample of 150 proof brandy and told to my son, I was not in the store, that he had the same thing like this for \$1.90 delivered to Chicago. I saw the goods, the goods was right. Then I came in and Frindel was again

there and then Shore came in to me and says, "Frindel is one of the New York distillers," he says. I heard that in New York there are over 100 distillers and many fruit distillers. And I said at that time to Shore, "There the whiskey is right good, I do not see how they can afford to give it for this price. If it is not right good why do they want so much money for it?" "Well," he says, for me to try and order and see what it is. I ordered a barrel by mail and they sent it to me and I got the goods and the goods was right and I mailed them a check for it.

Q. What do you mean by "right," good quality?—A. Good quality, yes, and I mailed them a check for it.

Q. Was that shipped to you by Frindel?—A. Shipped me by Frindel.

Q. From New York?—A. From New York, yes.

Q. Did that have the stamps?—A. Yes, sure, then I received a letter from Frindel, he wishes I would do him a favor, he shipped to Schrieber Brothers ten barrels of the same goods and the proofs are not right, what Schrieber wanted, if I want to take away off him five barrels of low, proof, 90 and 95 or 100, something like that, he will let me off five cents cheaper on the price, I says, "All right," and I took it.

Q. That was packed safe?—A. Yes.

Q. Regular goods?—A. And that cost me, just the goods, about \$1.25 a gallon. Then Mr. Frindel come over in a couple of weeks, he come over with Bronstein, introduced himself and tells me he is Frindel and this is Mr. Bronstein, head of a distillery in Baltimore and they are looking for a

location to open a distillery here which will give me a chance to get goods still cheaper. "Well," I said, "What kind of goods is that?" He says, "Well, you know like all the rest of the New York distillers," told me the right goods. I say, "You can't, how can you make it? I was a distiller myself and I know that goods had to cost about 60 to 70 cents a gallon to make it; how do you make it, do you use any other goods?" I say, "I know that you can't use no other goods than fruit distillers, must be fruit exclusively." "Well," he says, "it is not your business whatever we do, we will give you the goods." All right, I was willing to take of them goods, and they will give me for \$1.25 a gallon stamped goods, that is proof gallon, in other words that is \$1.80 for 150 proof. I consented to that, and then they went away and in a couple of months later about the latter part of August they come over again and they said they brought the distillery here and they got a place on Quinn Street. I never paid much attention to that. They say, "How much goods will you use?" I say, "Whatever you will give me, whatever I will be able to use I will use as long as you give me cheap enough. Of course I understand the Kosher, what you call all straight with the Government." I thought myself that I am—we have a hard competition from before from New York distillers here, this, I must tell you this, I could not do it, I will tell you only them some wholesalers they can use goods. If you go out and sell every saloon keeper, if you go and sell the retailers, it would not do. Might as well only the wholesalers.

Then I consented that I will take of them whatever goods I will be able to use and I tell them I

must have stamped goods, all regular stamped goods, because if they were not regular stamped goods I understand that I will get them in jugs, four-gallon jugs. When they begin to deliver goods, it was also, it was in December in 1908, they brought me once about ten or fifteen jugs and a couple of barrels and they entered the barrel in the Government book and then they brought in, another time they brought in a couple of barrels. I do not remember if I was home then or not, but when I come home I heard that they had delivered here a couple of barrels and I said to my son, "Did you enter them in that book?" "No," he says, "did not enter in the book. He brought in the barrels and he emptied them in a dumping tub and he took away the barrels all back." I say, "Why did they do that for?" He says, "He took off the stamp, the stamp was not attached to the barrel according to the law is and the barrel had no marks whatever that the stamp belongs to it, the barrel was not a brandy barrel, simply a plain wine barrel and the stamp tacked on there with a couple of tacks." And this my son tells me of that and they done that and took the barrel back and went away.

At the next time when he come there I say, "Max, what kind of business is that, are you going to bring in barrels? It is not a good thing in barrels with them stamps." He says, "This is my business." I say, "When you put on stamps, put them on right, you can put yourself in trouble and put me in trouble for receiving that kind of goods." "Oh," he said, "you don't mind that, business is done that way, done 20 years in New York City, and I don't see why you are afraid more than the rest of them." So he went on and I bought of them goods during

the months of September and the month of October and the latter part of October he quit to give me goods. I say, "What is the reason you won't give me goods?" A fellow come up by the name of Seltzer, he says he is another partner in it, he has another partner by the name of Seltzer and he opened up a rectifying house on Blue Island Avenue and he is going to give him every day the goods. He come up and he says, "I will give you some goods cost you 10 cents a gallon more." I say, "All right." "But," he says "you give me the barrels, empty alcohol barrels, and I will give you whiskey for it." I say, "What do you want to do that for?" He tells me that is the way they do, they take a barrel of alcohol and dump it and sell the alcohol to the retailers at five or ten cents on a gallon less, and then they have the stamp to place on these goods. And I say, "I don't want that kind of business." Then they don't give me no goods for about five or six weeks. Then they come over again, they would not give more goods to Seltzer because Seltzer did not want to pay them the price, he is the partner upon one side, on the other side he wants to give me goods, and they then begin to give me goods again. I can take the goods until about the last part of September then I went on the road for five weeks and the time I had instructed my son that he should not take no more than two or three barrels a week. I supposed my son did so, he did not take no more, maybe he did take a barrel or so more a week, I don't know, so I went away until the last part of March, and they went away home. When they was home they come up to me, before they come they said, "We got nine barrels in the distillery, if you want to pay the tax for them you

can have them at \$5 a barrel." All right. I paid them \$45 for it and I went to the Government and I bought the stamps, and then I went to look for the gauger and put the stamps on, and we go there and the owner of the distillery would not give them to me. He said they owed rent on that \$50. I had to pay after the stamps was paid and attached to the barrels, I had to pay \$50 for that too.

Q. Tell us just how you ran that business over there, who worked in it and how it was run during this time you were the owner of the business?—

A. I am the owner of the business and I am the salesman of the business and I am the compounder and the rectifier myself, but when I was away I had my brother, I learned him how to rectify and instructed him how to do it, and every time he had an order how to make up a barrel this way because my son is supposed to be the book-keeper and the inside salesman, and when I went on the road I always give to him instructions.

Q. How much time did you spend on the road, what days were you on the road?—A. Well, in succession I spent about six weeks on one trip, that means altogether away for three weeks and then I come home for a day or two and then go away again for three weeks. This is for the Easter season, what we call and I go traveling on the road selling the Passover goods.

Q. Where do you go?—A. I go all over the country, and in Canada.

Q. All over the country means what places?—

A. Everywhere, every big town.

Q. How far west do you go?—A. Beginning from Detroit, Toledo, Cleveland, Pittsburg, Washington,

Baltimore, Philadelphia, New York, go to New Haven, Hartford, Connecticut, Providence.

Q. In Canada where do you go?—A. In Canada I go to three places, Montreal, Toronto and Winnipeg.

Q. How much time were you away in this time that you were taking this kind of goods?—A. Well, I should judge about half of the time I am home and half of the time I am away.

Q. When you were away, what was the arrangement with regard to your son handling the business?—A. My son was only one thing he gets goods whenever I buy and whenever I am not home I would always sign the checks, and then I am arranged with the bank that he shall accept his own signature the time when I am away, as soon as I come home I take it over again myself.

Q. So that he had the authority to buy and run the business?—A. Yes, I leave him always this, although I am controlling, it is my privilege.

Q. What was your boy's position in the business, did he receive wages or salary, pay him anything?—A. Yes, he got \$3 a week and everything he needs.

Q. He is how old now?—A. He will be 22 next February.

Q. Recently I understand you have turned the business over to him?—A. Yes, in the last year, February, I took sick, a severe operation for appendicitis, and the doctor told me I should keep away from all business, from any excitement, I tried to cure myself during the summer, could not stand it, I was very nervous, I have very often pain in the back and lumbago and some different things they call it and I am suffering, and then my son got mar-

ried and I think myself I will do justice to him, I will give him over the business, and on the 12th of September I give it over to him.

Q. And you are out of it now?—A. I am out of it entirely, I do not do nothing now, when I can help him out a day or two. I promised to go for him on the road this season, and I did go on the road and then I was laid up in Buffalo for a week and I was sick there and I could not go.

Q. There was one occasion here when you were in Canada, I will ask you what you were doing in Canada, it was recently?—A. Well, when I was Buffalo I got a telegram that everything was settled. Then I went to finish my trip. I thought I would go around to Minneapolis and St. Paul, and I will be home by a couple of days and take a rest and then I will go on the southwestern trip. Of course, when I am in Buffalo, I am making Toronto and then I go to Montreal. From there I go to Winnipeg. Sometimes to go from Boston to Montreal and then I go from Montreal to Buffalo and then from Buffalo.

Q. Well, you were making your trip up to Winnipeg?—A. Yes sir.

Q. Did you come back as soon as you received a wire?—A. When I got to Winnipeg I got a telegram that I shall come home Tuesday night. I got the telegram, I just got there Tuesday night I just came there, I have a customer, went to look for mail, didn't get any, and this customer of mine is an old-fashioned Jew and he says, "You are Mr. Shapiro, there was a telegram for you." Where is the telegram? They could not place it.

Q. Well, you immediately came back, you did not wait?—A. As soon as I could, I got in Winnipeg at

11:30 and I left Winnipeg at five o'clock the same day on the road home.

Q. Now, how much of this unstamped goods, the goods that had not paid the tax, or where the stamp was taken off of these goods, did you get?—A. I can't say exactly how much I got but I should judge between 120 and 150 barrels.

Q. That runs how many gallons?—A. About 50 gallons to a barrel, some barrels run 75.

Q. That would be 6,000 or 7,000?—A. About six to eight thousand.

Q. Six to eight thousand gallons?—A. Probably that many.

Q. Did you receive 25,000 gallons from the Illinois Fruit Distilling Company or anything like it?—I did not receive 25,000 if I would be three years in business, how could I? My business did not run that much.

Q. Well now, what are the seasons, what is the best business in the liquor business among your people?—A. Among my people begins from February up to the 15th of April.

Q. You spoke about Passover wine?—A. That is Passover goods, yes.

Q. And business is picking up then?—A. Yes, we are selling the goods between January and February, between half of December and half of February, that is where the sales are made, and then shipping begins about the beginning of February and keeps on until the end of March.

Q. You don't do much business in the summer time in the hot weather?—A. No, No.

Q. How many weeks did you do business with the Illinois Fruit Distilling Company, how many weeks in all?—A. In both seasons?

Q. Yes.—A. I should judge between 30 and 35 weeks.

Judge McEWEN. If the court please, I would like Doctor Plummer to take the stand and withdraw this witness.

SAMUEL C. PLUMMER, called as a witness on behalf of the defendant, having been first duly sworn, was examined by Mr. McEwen and testified as follows:

Q. State your full name?—A. Samuel C. Plummer.

Q. You are a practicing physician in Chicago?—A. Yes sir.

Q. Attached to any hospitals?—A. I am surgeon of St. Luke's Hospital.

Q. Did you ever attend Mr. Shapiro who has just preceeded you on the stand?—A. Yes sir.

Q. What did you do for him in a medical or surgical way?—A. I operated on him for appendicitis, removed his appendix.

Q. And what date was that?—A. Well, I am not quite sure as to the date, I think it was in March, last March.

Q. Of last year?—A. Of last year, yes.

Q. Was that a severe operation?—A. It was in his case, yes.

Q. How long was he confined to the hospital?—A. Something over three weeks.

Q. And have you attended him since?—A. Since he left the hospital?

Q. Do you know anything about his condition today?—A. No, I don't.

Q. What was his condition when he left the hospital?—A. Well, he had recovered from the immediate effects of the operation.

Q. Are there certain what you might call standard effects from an operation for appendicitis, certain things that must always follow?—A. I could hardly say so, it always depends on the condition which is found at the time; in some cases practically nothing follows, in others there may be some trouble follows.

Q. For a man of Mr. Shapiro's years and apparent condition of health at that time, what would you say the natural consequences would be following an operation?—A. Well, I would not be surprised if he had considerable trouble following, because he not only had appendicitis, but quite a considerable peritonitis, extension of the inflammation outside of the appendix before he was operated on, and in cases of that kind it is not unusual, in fact it is the rule rather than some adhesions will form which frequently give rise to more or less pain and trouble afterwards.

Q. Is there any effect such as lumbago likely to result from appendicitis or a condition following appendicitis?—A. Well, a condition similar to lumbago might follow in some cases, and pain in the back, which is general in lumbago, however, rather nervous pains due to irritation in the region of the trouble he had in the abdomen, reflex pains.

Q. How long is such a condition likely to continue, or may it continue reasonably in a man of Mr. Shapiro's years?—A. Well, such a condition as that might cause more or less annoyance for two months afterwards, or even a year or two.

Mr. McEWEN. That is all.

Mr. PARKIN. That is all.

ALEXANDER HIRSCHFIELD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. McEWEN:

Q. State your full name.—A. Alexander Hirschfield.

Q. And you are a practicing physician here in the city of Chicago?—A. Yes sir.

Q. Regularly licensed?—A. Yes, sir.

Q. Did you have anything to do with attending to Mr. Shapiro?—A. Yes, sir.

Q. Do you know his present physical condition?—A. Yes, sir.

Q. What is it?—A. He is in a neurasthenic stage.

Q. And have you any opinion as to the cause of that from your examination of him?—A. It is subsequent to his operation for appendicitis, owing to the severity of his case; in his case particularly the shock of the operation and his condition was of such a condition that it has lasted up to the present time.

Q. Do you know how it affects him from your observation of him?—A. He complains of pains, particularly over the seat of the wound and the back, headaches, and is in a general nervous condition.

Q. Do you know whether he is confined to his bed at any time?—A. Oh, yes, he is, he is troubled with lumbago for many days, maybe for weeks at a time.

Q. Have you an opinion as to the probable course of this condition?—A. My opinion as to his case, as a neurologist, I would say that it is quite indefinite.

Q. It is quite indefinite?—A. Yes, as to the further condition of his case.

Q. That is, we have got to wait and see?—A. Yes, sir.

Cross-examination by Mr. PARKIN:

Q. A period of quiet and rest would be advantageous to him in his present condition, would it?—

A. Under favorable conditions.

Redirect examination by Mr. McEWEN:

Q. Favorable conditions, you would not approve stone walls and iron bars, would you?—A. Certainly not.

DAVID SHAPIRO, the defendant herein, heretofore called as a witness on his own behalf, was recalled and further testified as follows:

Direct examination by Mr. McEWEN:

Q. Now, how did you pay for this liquor, that is, you paid cash or checks?—A. Mostly checks.

Q. Sometimes cash?—A. Frequently did.

Q. And whom did you pay?—A. Every week.

Q. Well, to whom did you pay, what man or men collected?—A. Bronstein is the man, although Mr. Frank Weiss, Bronstein and Weiss, they were the ones.

Q. And you kept no books, you kept no books?—

A. No.

Q. Of your purchases, any bills or statements?—

A. No.

Q. By the way, have you any education, ever been to school?—A. Yes.

Q. Where did you go to school?—A. I never go to a school like the people here, in Russia, in the old country.

Q. Did you have school there?—A. Had a private school where they went.

Q. Well, you did not learn book-keeping there?—
A. No.

Q. And you never have kept a set of books in your life?—A. No, never have.

Q. You started in in a small way and kept it in your head, and then as your business grows your head has to grow as a book-keeping affair?—A. Never had a book-keeper in my life.

Q. Do you know how much business you did there in those seasons, what was the amount of business that you did, running back three or four years?—A. Well, I should judge I did between sixty to seventy thousand dollars a year.

Q. You mean each season?—A. Each year.

Q. Each year?—A. Figuring around from May to May.

Q. Yes, all that represents how many gallons of liquor?—A. Oh, I should judge about 20,000, from eighteen to fifty thousand, it all depends.

Q. How much of a banking business did you do? how much money did you bank each year?—A. I will tell you, I have figured up two years in succession, and was deposits a hundred thousand dollars a year.

Q. And does that represent your business, or does it represent—A. Well, you know—

Q. Cashing and accommodations?—A. It represents everything.

Q. Well, now what is "everything"?—A. Suppose I take out money from the bank to get some saloonkeeper's check and help him at cashing checks, then I take the checks there and deposit, or on some other occasions cashing for friends checks for somebody else's checks, changing checks.

Q. So that your bank account turns over many times in the year?—A. Sure, always.

Q. As a matter of money, not a matter of business?—A. Yes, I believe with every business man it is the same.

Q. That is, every business man in your line?—A. I believe so.

Q. Helping saloons out?—A. I believe must be with every business the same, I know the breweries, they are taking out cash from the bank every day, about five or six thousand dollars to cash checks around the stockyards, then take those checks and deposit the money, don't do no business, but turns around just the same.

Q. How much liquor did you buy of other distilleries and other dealers and wholesalers?—A. Well, I will tell you, I am buying as a rule brandies, I am using between ten and eleven thousand gallons a year.

Q. What is that?—A. And spirit goods, probably spirits I bought also about the same, about ten or twelve thousand gallons.

Q. Whom did you buy your liquors of?—A. Mostly brandies, I am buying of Spellman and spirits from Chicago Distilling Company.

Q. Spellman is a Chicago man?—A. Spellman is a New York man.

Q. Now, I think I have here a statement from the Chicago Distilling Company running back over a period of three years, beginning in 1907.—A. All right.

Q. Are you able to say whether or not that is a correct statement of deliveries; I would say, if there is any controversy as to the amount of liquor we bought, we will produce the distiller.—A. Well,

I believe they give the statement, it must be correct, statement of Chicago Distillery.

Q. This which I hand you and which purports to be a statement of goods bought from the Chicago Distilling Company, which I will ask the stenographer to mark "Defendant's Exhibit No. 1, for identification."

(The statement was marked as requested.)

I will ask if that is the statement you received from the Chicago Distilling Company?—A. Yes, sir.

Q. And purports to be a statement of liquors which you bought, beginning in 1907?—A. Yes, sir.

Q. Do you know how many barrels approximately your purchases from the Distilling Company amount to?—A. Well, I should judge about an average of sixty dollars a barrel.

Q. Sixty what?—A. Sixty dollars a barrel.

Q. I mean quantity, how many barrels?—A. How many barrels? I don't know exactly, between twenty-five and thirty barrels a month.

Q. I will ask you to look at a statement purporting to be all sales made to you by Charles Stern & Sons of New York and Chicago, marked "Defendant's Exhibit No. 2, for identification," and say if that is a statement given you by Stern & Company?—A. Yes, sir.

Q. As a statement of sales to you?—A. Yes, sir; what I bought of them.

Q. I show you likewise statements of Barton Vineyard Company covering the same period, Defendant's Exhibit No. 3 for identification, also Italian Vineyard Company, Defendant's Exhibit No. 4, for identification, also statement of Byron E. Veatch, also statement of Freiberg & Kahn,

consisting of three sheets, and ask you if those are statements furnished you by the wholesalers?—A. Yes, sir.

Q. As statements of sales to you?—A. Yes, sir.

Q. You have not a statement here of Spellman?—A. Spellman?

Q. We had a statement but seem to have mislaid it, do you recall how much you bought from Spellman of New York?—A. Yes, sir.

Q. What did you buy from them?—A. I bought of him 150 barrels, bought of him in 1907, and I bought of him over two hundred barrels in 1908, and I bought 160 barrels in 1909.

Q. What about 1910?—A. I did not buy any, because it belongs to my son, what I call the buying, we are furnishing goods in October and November.

Q. You mean that you don't know about the last year?—A. It means this year, I don't know whether we are getting goods in January.

Q. Oh, I see, you buy for the year ahead?—Yes.

Q. How much less did you buy from the various wholesalers and distillers of spirits of the kind similar to the kind you got from the Illinois Fruit Distilling Company, how much less did you buy?—A. The price less—

Q. During the period that you bought from them?—A. Between twenty-five cents to twenty-eight cents a gallon.

Q. I do not mean the price, the number of gallons?—A. Oh, well, I should judge it was a very little difference, probably 2,000 gallons less than I bought previous.

Q. And the difference is the difference between the 2,000 and the six or eight thousand gallons that

you say you bought, does that show in the stock over in the store or does it show in your sales?—A. It would not show in the sales, because I will tell you the goods that I bought of them has been bought, and I will explain to you how when I buy from the Chicago Distillery a barrel of goods suppose I pay \$1.50 for it, I can't sell it for less than \$1.60 or \$1.65; when I bought the goods for a dollar a gallon I have tried to sell it for \$1.30 a gallon or \$1.25 a gallon; therefore, I could not keep no account, the chances are that I have maybe bought and sold a couple of thousand gallons during the two years more than I would buy in regular business.

Q. Because of the cheaper price?—A. Of the cheaper price.

Q. Did you in your business find that you came in competition with other dealers who had cheap liquor?—A. I should say I did, certainly.

Q. When did you begin to run into that competition?—A. In 1907, a fellow come from New York here and began to sell goods at a remarkably low price, Passover goods, and I began to look around to see where them goods come from, begin to inquire from one to another, I find that they have such distilleries in New York, they are making that kind of goods. I begin to look around for that kind of goods, and probably I shall be able to be in the market. I have got goods from a New York distiller at a remarkable price cheaper than even I could sell it, cheaper than I could buy it.

Q. Did it have the stamp on?—A. Had the stamp on, the rectifying stamp on, I have bought stamps, got them direct from the warehouse, never got it, I bought it from — bottle goods, which I know that

there is such goods going on, and I had to go and look for it, to be in the market for the competition, I meet the competition.

Q. To meet others who were cutting the price?—

A. Yes.

Q. At the time of your original talk with Bronstein and Frindel, was there anything said about settlement of cases, about settling with the Government?—A. I was ask them this, and as I have read once, being a distiller here in Chicago, I have read the Serial 7, No. 7, it is called a book what is got out, regulations for distillers, describing everything how the laws are and so on, and I found there that there is a punishment for buying of quantities for over twenty gallons at a time from an illicit distiller, but from a licensed distillery there is—there could be no punishment, because everything is taken care of, so that should not come anything with it that is not right, I know, I had a distillery myself for six months, and I see that I could not get along and run the distillery on straight ways and I had to give it up. I lost two thousand dollars inside of six months, and I had to give it up. I know that there is no punishment for to buy—if there is a punishment, it is a very little one as the books says, twenty gallons or over, if I buy it from an illicit distillery, and I know it that there is a punishment for it. I know that it is not giving away goods from a distillery without buying the stamp, and that is their business, not my own, and I thought here is something I never had any occasion to hear that there is a punishment for it. I have asked those people, “How is it they run distilleries there?” The people that are selling the goods, they say to me, called me names, mentioned me

names that they settled with the Government for fifty dollars or a hundred dollars just not to be took in court. Mr. Bronstein himself tells me that he ran a distillery for six months or nine months there and the Government caught him removing five barrels from the distillery without stamps, and he settled that for five hundred dollars, and he come here, not to be known that he is here, always coming around and tells me the joke that Mr. Smith or Mr. Chandler was in the store asking for Bronstein, and they ask him where Mr. Bronstein is and he said he didn't know.

Q. You mean he went by different names here?—

A. He went by different names, never give up his name. Of course, he told me everything how it is done, and when I see that thing goes too far, I tell them "Boys, quit, you will have to quit." And they says, "We will not be quitting, do you want to be an informer, you go to the Government." I say, "I will not be an informer, and I would not do anything." They says, "We will put on you everything anyhow."

Q. Well, how did you come to quit the buying—by the way, did you call Bronstein or Weiss up on the telephone and say that the Government officers had seized your check books?—A. Why, he was that day in the store himself, Bronstein, I and Mr. Smith and Mr. Chandler were in the office and he was in the store.

Q. Bronstein was?—A. Yes.

Q. When the officers came over there?—Yes, and as soon as he seen that the officers are here, he sneaked out through the back door, then he waited, and when they went away, he came in and asked what they found.

Q. Did you buy any goods afterward?—A. No, sir.

Q. How long before that did you quit buying goods?—A. About a couple of weeks before, or a week before, something like that.

Q. Had there ever been any feeling between you and Bronstein on the subject of his entertaining your son?—A. Why, that is something what I would—they hurt me in every way, I would not like to if I can avoid that, they used to take out my son every week, and I got home, and they took him out every week in such a place ain't worth while to mention.

Q. Now when did the trouble, after the trouble came and you were talking about settlement, were these men over to your store to ask you to put up money to help settle?—A. Why, as soon as they arrested Frindel, they began to ring the bell, should go and give bond for them, if not, he will turn everything on me. I didn't pay attention to that. As soon as he was out on bond, he come over in the store, we should give him money to get free. After a little while, I have been arrested and Max Bronstein and Weiss come around with Peter Sissman in my store and I was then sick and nervous and I could not stand it, I left it over to Mr. Bierski, because on the middle of May I could not attend to the business and I said I am up against it and I took in Mr. Bierski that he should work for me, and he talked to them, I was merely present, and they were always asking that I should give money, and should give money, and money, and money, and I says, "For what shall I give money?" They say, "Give money, give money, you have so much." "We have no money." "You have to give money."

Q. Did they put any figure as to how much you should pay?—A. Yes, I shall give five thousand and Schreiber shall give five thousand and Bloom shall give and Rosenstein five thousand and for fifteen thousand they will settle; he had a figure from Mr. Ingram that will be settled then, twelve thousand or fifteen thousand dollars. I say, “Where is your money, you all made money like that, where is your money?” “We have no money.” “Well, if you don’t got no money, we will go and tell on you, we will turn state’s evidence, turn state’s evidence.” “Well, they went, I got sick of them. I said, “For God’s sake, go ahead and do whatever you please, I will not deny anything, when we come to get information that you can settle, of course I will try to settle.” I had a telegram: “The thing has been settled.” It has not been settled, it is not settled, and I am right here.

Q. You had an idea as to the law that the distiller was the man to look out for the trouble?—A. Yes.

Q. And that the purchaser did not take any risk?—A. I did not hear any information that the purchaser should bear the trouble, in other words, I heard that the distiller should be in trouble, I always heard, always settled with the Government, I thought when it come to the worst that I will settle, and that was my information.

Q. Do you know whether that was the general idea among the distillers in the trade that if they could buy this stuff and not get caught, all right, and if they got caught, they could settle?—A. Happened to me during the time, being in the business, they found a barrel incorrectly emptied or not emptied, they found the stamp not scratched, and it is

a fine of fifteen dollars, twenty-five, once I paid fifty dollars compromise.

Q. Those were single cases where you neglected things, where there was not any intention, but where you did not comply with the regulations?—A. I never heard anything, I knew only one way, the Government is settling cases every day.

Q. What did you have to do with taking stamps off the barrels, did you take any off?—A. I never took a stamp off a barrel, I had no reason, why shall I take? The first thing when they brought the stamps, never put on right, nothing but two pins, they had some kind of paste used by, and used to take out the two tacks as soon the barrel used to come in.

Q. You knew he took the stamps, but you did not take off any stamps?—A. No, sir, never did.

Q. What did your brother have to do with the business?—A. My brother has absolutely nothing, he would help me out in the rectifying room when I used to go away.

Q. He had no ownership in the business?—A. No, he is New York Life Agent for the last six years.

Q. Had nothing to do with it?—A. Nothing in buying and selling except over the bar, anybody used to come in and buy a gallon or half a gallon of whiskey or brandy.

Q. What did your boy have to do with this all?—A. My boy has never bought. He went out as a salesman, tried to break him into that by being in the store there awhile, get to see everything shall be in the right place.

Q. Your boy has paid for these deliveries. I say your boy paid for some of the deliveries of the liquor in barrels?—A. Yes.

Q. Was that by your direction?—A. My direction.

Q. Or on his own account?—A. He had no account.

Q. That is, you mean he had no authority except as you gave it to him?—A. He had no authority to buy anything, except to telephone to Chicago or to the U. S. to send over a couple of hundred labels, such kind of things.

Q. And from that, I understand you to mean to say that you were entirely responsible for the whole business?—A. Sure, I am entirely responsible, my son has no responsibility.

Q. Now tell us how about these checks that you cashed on Baltimore banks where Weiss or Bronstein would bring in a check on a Baltimore bank and ask you to give them cash and you would give them a check?—A. Well, they used to bring me in checks, I meant to tell you that while Seltzer was there, Bronstein used to come around, used to get checks from Baltimore dated ahead, and when they used to deposit here in the banks, when the day comes the bank would not give them no credit for it, he would give them credit when the check returns and is paid, after they found they could not get around that, they come to me and used to cash me two hundred dollars or three hundred dollars checks mostly of his brother D. Bronstein.

Q. Did the Government officers get all the checks that you had?—A. Yes.

Q. You had not thrown any of them away or lost any of them, they got them all?—A. They got them all, I believe so, they have picked out every one of them from the other checks.

Q. How much liquor that you bought from the Illinois Fruit Distilling Company did you pay for

in cash, and how much of it in checks, that is, would you say one-half of it was paid for in cash or three-quarters or one-quarter?—A. About probably five per cent.

Q. That is, about five per cent was paid?—A. In cash, I can't say exactly, but to my knowledge.

Q. Could you pick out of those checks in the possession of the United States District Attorney, those ones which are accommodation cashing checks?—A. I can not.

Q. Where you find a check coming from Baltimore with a stamp?—A. Well, that might be that they cashed by me that check and took the check to send away money to Baltimore, because it was down there probably to cash my check there.

Q. That might have been for liquor, the one they sent to Baltimore?—A. Might have been for liquor or cash, I don't know.

Q. Take, for instance, this check, April 12, 1909, with a lot of bank stamps on the back, some of them, I believe, a Baltimore bank, could you tell by looking at that whether that was for liquor or whether that was an accommodation?—A. I can't tell that, I know that that is my check and I know that went away to Baltimore probably for some money, I can't tell that.

Q. Have you footed up these checks?—A. Yes, in rough figures.

Q. About how much?—A. About ten thousand dollars was there.

Q. I believe the accurate footing is \$9,092.81.—A. But there are checks in there from Frindel for goods we got from New York too.

Q. How is that?—A. There are checks which have been paid to Frindel for goods entered in the

Government book and received from New York, not from the Illinois Fruit Distilling Company.

Q. Can you tell how much, can you pick out these checks?—A. Yes, sure, paid to Frindel direct.

Q. The Frindel checks are for regular goods?—

A. Regular goods, yes, there is everything regular here too, there is all these same goods is in here too, these checks does not represent from all illicit goods, the checks represents for all the goods I got.

Q. And is the check here for these nine barrels?—A. Yes, everything is in here, for nine barrels I got them, probably thirty barrels more of 150 proof.

Q. How much money would you say was represented by these checks for regular goods, that is, which paid the tax?—A. I should judge about half of it will amount here to the regular goods.

Q. That is an estimate?—A. About.

Q. And the Frindel goods were all regular?—A. Yes.

Q. Did you ever talk with Mr. Weiss over the telephone and tell him that some man was watching in front and to get hold of Max and call him back?—A. I don't know that, never did.

Q. Mr. Bronstein referred to a conversation where two stamps were to be paid for, for \$10.00, this morning, do you remember anything about such an interview?—A. I don't know anything of that kind, I don't know anything of that kind.

Q. What class of goods did you handle, that is, how high proof?—A. Up to a hundred fifty proof.

Q. And what did you agree to pay Bronstein for these goods, what are the prices?—A. I paid ten cents a gallon.

Q. How?—A. Ten cents a proof gallon.

Q. Well, that is, if it was 100 proof, paid him a dollar?—A. \$1.20.

Q. Well, just how do you do that, will you explain that so that I will understand it?—A. You see, we paid that by proof gallons, all the brandies and whiskies sold in America goes always by proof gallon, a gallon in measure 100 proof strong is called a wine gallon, and the proof gallon it is the same. For a gallon in measure 150 proof strong is called a wine gallon, it is called a wine gallon and a half in proof.

Q. Well, how much did you pay for 150 proof, pay to Bronstein?—A. \$1.80.

Q. \$1.80?—A. Yes sir.

Q. How much was that under the market if it had been regular goods?—A. About 12 cents.

Q. And for 100 proof gallon what did you pay?—A. \$1.20.

Q. Did you get any of it as cheap as \$1.05 or 95.—A. I beg your pardon?

Q. I mean did you buy any of that liquor as cheap as 95 cents a gallon?—A. Yes, sir, I did.

Q. What was the cheapest that you got any of it?—A. \$1.35, 150 proof.

Q. And how do you change that into 100 proof gallon, what would that be, what price?—A. About 94 cents.

Q. What are you worth, what is your financial standing, Mr. Shapiro?—A. Today?

Q. Yes.—A. I can't tell, I can't tell what I am worth, I am worth one way twelve to fifteen thousand dollars and the other way I ain't worth a cent.

Q. Well, in the way that you are worth twelve to fifteen thousand, just what do you mean by that?—A. I mean when everything goes along

right, I am not bothered from the Government, I am left to liquidate my business and sell the house at a regular time, I am worth twelve to fifteen thousand dollars. If I am pressed to the wall in a minute, I ain't worth a cent. I have a good house, I have been offered \$23,000 for it last summer, I have tried to sell this house today for seventeen and I can't get it.

Q. It has a mortgage on it?—A. 1205.

Q. Your ability as a salesman—is your ability to work, as a salesman in a liquor business?—A. Yes, when I am in good health I can make a living all right as salesman in a liquor business, I can sell goods.

Q. What are your family burdens with regard to whom you are supporting?—A. To support I have today a daughter of seventeen and a boy of seven, and an old father and mother 70 and 73 years old, and I have a sister with six orphans, a widow who needs my assistance of course, I don't give them as much as they need, but I have to assist them as much as I can.

Q. You are what is called an Orthodox Jew?—A. Yes sir.

Q. And belong to one of the westside congregations?—A. Yes sir.

Q. You have lived over there among them a considerable time?—A. Yes sir, lived on the west side 19 years.

Q. What congregation do you belong to?—A. I belong to the Synagogue.

Q. Are you connected with any other Jewish organization besides that?—A. Yes, I take a hand in all the organizations, until I got sick. I was connected with the B. M. Z. the orphans' home, I

worked for them and I worked for any other institutions. I was Vice President of the Hebrew Free School, of the higher school, the High School, the Hebrew High School, Hebrew Free School.

Q. You have been active and prominent in the affairs of your people.—A. Took a part in everything.

Q. Social, educational, religious affairs of your people on the west side?—A. Tried to take a hand in everything.

Q. Do you think of anything else that you care to state that I may have omitted that you want the court to know, if you think of anything that I may have omitted that you want the court to know?—A. If this is pertaining to the case——

Q. How?—A. If this is pertaining to the case, I can state in detail about Frindel and Bronstein, who the owners were, if that is anything particular to me.

Q. Who told you that?—A. They was in my house.

Q. They were in your house?—A. They had fights every day and they had feeling one each from another, grabbing each from another and they had every day come around to make settlements.

Q. You mean they came over to your house, met there to dispose of things sometimes?—A. To dispose of them, yes.

Q. What did they tell you as to who ran the distillery?—A. The distillery belonged to Bronstein, then he got Frindel here and put in \$800 and to get \$40 a week for it, and the distillery should be in his name, and they got in a contract, a paper that if anything happens with the Government, Bronstein is responsible. Then they could not agree both

together. They brought a fellow by the name of Seltzer, could not agree with Seltzer. They brought over Frank Weiss. Actually the owner of the distillery is Bronstein and Weiss, they were doing all the business, and belonged to them. Frindel was merely a delivery man.

Q. That is what they told you at your house?—

A. How?

Q. That is what they said at your house when they came over there with their disputes?—A. Yes, yes, when the Government took a smell of the mess, and they expected trouble they come over, and Frindel began to run the distillery himself and tried to peddle around with his goods, and he came to me and I did not took off anything. To whom he sold it I don't know. They always tried to shove me in goods, but could not sell me five cents. I never bought of Frindel five cents of goods, all the goods I got I got from Bronstein, from Bronstein and Weiss and part of it of Seltzer. And if it is to my interest, I heard that Bronstein stated that he sent to his brother about 600 gallons, which I knew that he shipped him three or four barrels every week, by receiving wholesale liquor dealers' stamps and put them on the barrels here and shipping them back again.

Q. How do you know that?—A. Because he used to show me the stamps, he got it from there and his brother told me while down in Baltimore that is the way he got it, and he got it at a dollar a gallon, same price we got it. Frindel used to get \$1.10, and I told the brother how much I am paying and he didn't pay no more than I am paying.

Q. Two or three barrels a week would be 150?—

A. It would be about 200 gallons a week.

Q. Do you know for how long a time that was kept up?—A. I suppose during the time they all got goods.

Q. 35 to 40 weeks?—A. About.

Cross-examination by Mr. PARKIN:

Q. You knew all about their business, didn't you?—A. I suppose so.

Q. They told you everything about it?—A. Yes sir.

Q. Sort of came to you as a counsellor, a friend?—A. Not exactly a counsellor, a friend.

Q. And whenever there was any dispute or any money to be raised, they would come to you to get it or to get the advice?—A. No, not exactly to me to get it, they used to tell me that they had another customer, used to settle disputes, had a regular arbitration board here. Shore was on one side and the Alex on the other, and used to have this one tell his story, probably told that to everybody, all the dealers who bought of them goods.

Q. So that practically all the time, from the time that they opened the distillery until the Government seized it, you knew practically all about the business of the distillery?—A. Whatever they told me, I did know it.

Q. Now, where were you educated, where were you educated?—A. In Russia.

Q. Studied to be a Rabbi, didn't you?—A. Yes sir.

Q. And did you ever act as a Rabbi?—A. No.

Q. But you prepared yourself?—A. I did, yes.

Q. Did you know what kind of stuff his brandy is made out of?—A. I know it is fruit brandy.

Q. Did you know that they had used anything else?—A. No.

Q. You knew it was not Kosher brandy, didn't you?—A. I found out, at last I did.

Q. Well, you knew it?—A. Beginning I did not.

Q. How long after the beginning did you know it was not Kosher brandy?—A. I know it after three or four months.

Q. You sold it as Kosher brandy?—A. I did not, beg your pardon, never did that.

Q. And did not Bronstein tell you you ought not to do that, it was not Kosher brandy, you ought not to have the Kosher mark on it?—A. Never had occasion to do it, because I didn't do it.

Q. You did sell some of it as Kosher brandy?—A. No, sir, I didn't.

Q. How many times have you been indicted?—A. Indicted where?

Q. Anywhere?—A. Once.

Q. Where?—A. Criminal Court.

Q. For what?—A. Charged with arson.

Q. What building was it charged against you that you had burned?—A. It was not charged me, I had burned, it was charged I had conspired.

Q. That you had conspired to burn what building?—A. It was that time 516 South Halsted Street.

Q. Did you occupy that store?—A. Yes sir, no I didn't occupy that store then.

Q. But you had a couple of people occupying it for you, didn't you?—A. I had a couple of people who I sell the store to, I had an interest there.

Q. Their names were Bronstein—A. Bronstein and Lavin.

Q. And Lavin?—A. Yes sir.

Q. Now, when was the first time you ever did any business with Frindel?—A. As I have said before, in 1908.

Q. That was before the Illinois Fruit Distilling Company was opened, wasn't it?—A. Yes sir.

Q. You bought some goods from New York, didn't you?—A. Yes, sir.

Q. Frindel was running a distillery at Hudson, New York?—A. No sir, he didn't tell me that.

Q. You know it now, don't you?—A. Do now, but I didn't know anything then.

Q. Where was his distillery?—A. I don't know.

Q. Where was these goods that you got from Frindel sent from?—A. It is marked in the book from Hudson distillery or from a fellow by the name of Akers, I believe.

Q. Well was that distillery, did Frindel sell goods from that distillery?—A. I bought from Frindel goods and he shipped me the goods from New York and I examined the package, whatever the stamp on the barrel calls for I enter in the book, I don't know from where he got it.

Q. Well do you remember what stamp it was?—A. How could I remember that?

Q. And you got some goods from the St. Louis distillery, too, didn't you?—A. No sir, I didn't.

Q. Did you ever write to Frindel about the St. Louis distillery?—A. I don't know if I did or not, I don't remember, probably I did.

Q. That was a crooked distillery, wasn't it?—A. I had an offer from there, once, yes.

Q. That was a crooked distillery?—A. No, it was a licensed distillery, if your call the Illinois Fruit Distillery a crooked distillery, then that one was supposed to be crooked too.

Q. It was?—A. I don't call it crooked unless I know they are crooked.

Q. Have you any doubt of the Illinois Fruit Distillery being crooked?—A. No, I haven't.

Q. You knew it all the time, didn't you?—A. Yes sir.

Q. Was the St. Louis the same kind?—A. I never had any business with them I don't know how they are.

Q. Now, at the time that Bronstein and Frindel and Weiss came from New York you had two barrels of the Hudson brandy or whiskey in your place, didn't you, two barrels that you got from Hudson, New York, were in your store?—A. At the time Frindel and Weiss and Bronstein came.

Q. Came from Baltimore, yes.—A. At the time that Frindel and Bronstein and Weiss came, I had nothing of that goods.

Q. Just about that time you had two barrels from Hudson?—A. Not about that time.

Q. When did you empty those two barrels?—A. I bought one barrel, not two barrels, I got of him one barrel once and the other barrel some other time, a little later, and I had five barrels which I got here from Schrieber, paid Frindel for it.

Q. You had those two stamps of those two Hudson barrels when Frindel and Bronstein came here, didn't you?—A. I don't understand what you mean by that.

Q. Didn't you have the stamps that you took from those two barrels from Hudson, New York?—A. Who took off?

Q. You took off?—A. I didn't take off, and I know nothing of the kind.

Q. And didn't you sell them to Frindel or Bronstein, one or the other or both?—A. No sir.

Q. Those two stamps for \$5 a piece?—A. I had no stamps and I didn't had nothing to sell.

Q. Now, the money which Bronstein asked you to put up with the Government and asked you to raise was the money which you should give the Government as an offer in compromise, wasn't that it, do you understand my question?—A. No, not hardly.

Q. Bronstein asked you to put up \$5,000 in compromise, didn't he?—A. Yes.

Q. He didn't ask you for \$5,000 for himself?—A. No, he didn't ask for himself but he said I shall deposit it with his lawyer, what would be done with that I don't know.

Q. Well, you understood that if it was deposited it would be for compromise with the Government, didn't you?—A. I don't know, I didn't understand nothing, that is why I refused, I say, "If I shall deposit money I can deposit myself."

Q. You afterwards did deposit \$5,000 with the Government, didn't you?—A. Yes sir.

Q. As an offer in compromise?—A. Yes sir.

Q. How much more did you offer?—A. Oh, I offer everything that I can.

Q. No, how much did you put up with the Government?—A. I put up \$4,000 myself.

Q. No, all together?—A. I put up \$4,000 by myself. I want the court to know I put up \$4,000 by myself. I did not put up a cent—for myself, my friends put up some more money for me, and this I don't care how much they put up.

Q. Now, you put up a part of that \$27,000 additional offer in compromise, did you not?—A. I have put up \$4,000 with the Government myself.

Q. Is that all that you put up?—A. That is all that I put up.

Q. Did you not put up a part of \$27,000 afterwards put up with the Government?—A. A part of it has been put up for me, yes.

Q. Yes, how much of that?—A. 7,000.

Q. So that there has been put up for you, \$11,000?—A. Yes.

Q. In compromise of this?—A. Eleven or twelve thousand.

Q. You state that you never purchased from the Illinois Fruit Distilling Company 25,000 gallons?—A. Yes sir.

Q. How do you account for your checks being issued to the distillery, Frindel, Bronstein or Weiss, amounting to approximately \$10,000.—A. Why, there is about 30 barrels of brandy that paid the stamp at \$1.80, there is in those checks there for Frindel which I have paid for those seven or eight barrels, and there is checks for carriage and everything, everything is in there.

Q. Now, you did not pay for any of your brandy in checks, did you?—A. Yes, I said so.

Q. Do you understand my question?—A. I do.

Q. By these checks?—A. Yes sir.

Q. They represent all the money?—A. Yes.

Q. That you ever paid out at any time to the Illinois Fruit Distillery, Bronstein, Weiss or Frindel, for brandy or spirits from that distillery?—A. Yes.

Q. Is that correct?—A. No, I said there is part of that has been paid in cash.

Q. How much in cash?—A. I don't remember, I cannot tell.

Q. 10,000?—A. No, probably a thousand or fifteen hundred dollars has been paid in cash, 2,000, I can't remember every transaction like that.

Q. How much of this brandy which you bought from the Illinois Distilling Company did you sell in barrels to other people?—A. This I cannot tell.

Q. Who did you sell it to in barrels?—A. To whom I sell barrels? I sell barrels wherever I could sell it.

Q. Who?—A. I remember to all my customers.

Q. Name one?—A. I sold Bronstein himself took away, he got of me, he got of me about 20 barrels, sent it away to his brother in Baltimore.

Q. Name one to whom you sold any brandy, that you got from the distillery, in barrels?—A. I can't, I sold to all my customers, I sold to Rosenfield.

Q. To Levinkind?—A. To Levinkind I sold once 5 barrels.

Q. Rosenstein?—A. Rosenstein, no, I did not.

Q. Matenberg?—A. No.

Q. Schwarz at Waukegan?—A. No, never sold Schwarz at Waukegan, never sold to Matenberg, never sold to Rosenstein.

Q. Ever sell Shimberg?—A. No.

Q. Or Tucker?—A. No.

Q. Weiss?—A. No.

Q. Cohn?—A. Tucker, probably did sell a barrel, not these goods.

Q. I am talking about these particular goods?—A. No.

Q. Levin?—A. Who?

Q. Levin?—A. No.

Q. Rosenschweig?—A. Rosenschweig, yes, I did sell.

Q. How much did you sell to him?—A. I don't remember, 5 or 10.

Q. Mr. Rosenschweig, is the gentleman here (indicating)?—A. Yes.

Q. That was the same kind of goods you got from the distillery?—A. Not exactly the same kind, blended.

Q. I mean the same stuff, but you blended it, did you?—A. Yes, sir.

Q. How much did he pay you for it?—A. \$1.50.

Q. 150?—A. No, 100 proof.

Q. Did you ever sell to Blum?—A. No.

Q. To Rosenstein?—A. No.

Q. Schrieber or Wexler?—A. No.

Q. How much in all would you say that you had sold right in the barrel, just as you got it from the distillery, to these retailers?—A. I never sold it that way.

Q. How did you sell it?—A. I never sold it that way, the way I got from the distiller to the retailers.

Q. What would you do with it before you sold it?—A. I sold it rectified goods, the goods that I made from them, I never sold that way.

Q. Well, how much did you sell?—A. I can't tell, I can't recollect.

Q. Can you tell within ten thousand?—A. I can't by ten thousand.

Q. Now, you say during the year 1907 you bought 150 barrels?—A. Yes.

Q. Of brandy from Fellman?—A. Yes.

Q. What kind of brandy was that?—A. California brandy.

Q. Same kind that these men made here?—A. No, California brandy, it was stamped goods, regular goods.

Q. And you used every year from ten to eleven thousand gallons of this brandy, is that correct?—

A. Yes.

Q. And after you got this so cheap from the Illinois Distillery, you said on your direct examination you probably bought a little more of it, isn't that correct, because it was cheap?—A. Yes.

Q. And you sold a good deal more of it because you could sell it cheaper, isn't that true?—A. Not exactly a good deal more, but sold a little more, yes.

Q. Well, five or six thousand gallons more?—

A. Well, you think five or six thousand gallons was an easy thing, five or six thousand gallons goes too far.

Q. Well, how much?—A. Probably a thousand gallons, five hundred gallons.

Q. You said on your direct examination that you sold over two thousand, which is correct?—A. I have said I cannot remember exactly, I should imagine that.

Q. Is it 1,200 or 2,000?—A. Probably twelve or two thousand.

Q. As a matter of fact——A. Not as a matter, in two years' time I can't say whether it was 50 gallons more or less.

Q. Did I ask you about 50 or 100?—A. These are things I can't remember.

Q. Can't you tell within a thousand gallons how much more you used after you began to buy of the distillery here?—A. I believe I can.

Q. How much?—A. That is what I said before, between 1,200 or 2,000 gallons, this is the highest it can be, judging according to my business.

Q. So that that year you would sell from twelve to thirteen gallons?—A. I beg your pardons, what I

meant, that I have used for both years, that is what I have used for both the years.

Q. You stated on your direct examination?—A. Yes, I meant for both years, I meant the whole time.

Q. In response to a question by your counsel, “I used ten to eleven thousand gallons of brandy yearly,” now, did you mean that?—A. Yes, what I am using all the time.

Q. Did you mean yearly?—A. Ten to twelve thousand gallons yearly, yes.

Q. Every year?—A. Every year.

Q. That is, from one May up to the next May?—A. Yes sir.

Q. Now then, if you bought from twelve hundred to two thousand gallons more during the time you bought of the Illinois Fruit Distilling—A. Yes.

Q. (Continued). Then, you used, used from twelve to fourteen thousand gallons, is that not correct?—A. Might be, yes.

Q. So that it would not be strange if you had during the two years that you bought from the Illinois Fruit Distillery, it would not be strange if you bought fifteen to twenty thousand gallons of brandy, would it?—A. Sure, it would be strange.

Q. Now, you say that you had no knowledge about the violation of the law that you were doing, you had been a registered distiller, yourself, had you not?—A. Yes sir.

Q. Over on Taylor Street?—A. Yes.

Q. That was in your name, was it?—A. Yes.

Q. And while you were there, you had some altercation with the Government, did you not, about the taxes?—A. No.

Q. Did you not pay in compromise then a sum of money to the Government?—A. No, no.

Q. I direct your attention, was it the year 1908?—A. I believe it was then.

Q. Yes, and that was what kind of a distillery?—
A. Fruit distillery.

Q. 1898, now, at that time, isn't it true, Mr. Shapiro, that your accounts were found short, that is, you did not report to the Government the number of gallons that you were required to produce from the number of pounds of material that you took into your distillery?—A. Yes.

Q. You remember that now, don't you?—A. Yes.

Q. How much did you pay that time?—A. There was sent in a bill from the Government for \$4.70 and my partner, Mr. Levin, he fought with them and he never paid, and sent for it, should go together, \$4.70 special tax, it was a shortage according to the proof.

Q. Now, at that time were you familiar with the laws governing the distillery?—A. Yes.

Q. And that was a fruit distillery?—A. Yes, sir.

Q. Now you say that your son told you that Bronstein had taken off the stamp, when was that about, now, I don't want to ask you precisely, but approximately, when was that?—A. I can't tell you exactly when it was.

Q. When, can you tell me within six months?—
A. Within six months, it was in 1908.

Q. And after that you bought more brandy from the same people and stamps were taken off the barrels with your knowledge, you made no objections to it?—A. No, sir.

Q. Now, did you make out these reports yourself personally?—A. Not all the time.

Q. Were they made out under your direction?—
A. Yes.

Q. With your knowledge?—A. Yes, of course.

Q. And you knew what they contained?—A. Yes.

Q. Now you did not report all of the barrels of brandy that you bought from the distillery, did you?—A. Yes, we had regular stamps, we have reported.

Q. But the others you did not report?—A. Did not report.

Q. Do you remember when Mr. Smith and Mr. Chandler and Mr. Beach came over there and went through your establishment, were you there at that time?—A. I guess I was once or twice.

Q. This time was when they discovered five barrels of spirits and brandies without marks and brands, do you remember that?—A. Yes.

Q. And they seized five barrels?—A. Yes.

Q. Where did you get that stuff?—A. Why, that was from dump.

Q. Where did it come from originally?—A. From the dumping.

Q. Well, before it got to the dumping?—A. One comes from the original, there is two packages, one is high proof alcohol, 190 proof.

Q. Where did you get that?—A. From the Chicago Distillery.

Q. What was the other?—A. And one barrel is the spirits, I don't know how many gallons was there, and one has been made up for something, and two barrels have been filled up.

Q. Whose goods were those last two barrels?—A. I believe, I can't tell you exactly whose goods it was, I believe it was Illinois Fruit goods.

Q. You knew that the tax had not been paid on this, didn't you?—A. No, I do know that it was paid, because I was there.

Q. Where were the marks and brands that should have been on the five barrels?—A. Well, I am telling you, the one tank was leaking, and we had to put it into the barrel, and that barrel was leaking too, and we had to put it in another barrel, there was not full barrels of them, and the other packages, and when the gauger come around and scalped these barrels, that workman—we had Pollock there, he used to scrape off the barrels, that is all there is to it, we never paid attention much to it, I figured them up, original packages, I can dump in small packages, and it was marked with chalk 27-B on it, if it was not, there would be no chalk on it.

Q. They also went across the street into a basement you had over there, didn't they?—A. Yes, sir.

Q. How many gallons of brandy did you have over there?—A. I had my stock of bottled goods there, I have now a stock of bottled goods, or my son has.

Q. How many bottles of brandy did you have over there?—A. That is something I don't know, sometimes we bottled up five thousand gallons.

Q. You carry a stock of about five thousand gallons, don't you?—A. Yes, in season.

Q. And there was about five thousand gallons over in that basement at that time?—A. I don't know how much it was that time, I believe Mr. Smith knows better than I do.

Q. Approximately?—A. I don't know, probably it was only 2,000 gallons, should be, I know.

Q. Now, you say that you understood the goods were not all right with the Government, what did you mean by that?—A. I meant that it was stolen from the Government, not paid the tax on it.

Q. That was when you first talked about buying the goods?—A. Yes.

Q. And you know that, because it was so cheap, wasn't that it?—A. Yes, that is all.

Q. How much did you pay for those barrels of brandy you got from Hudson?—A. \$1.30 a gallon.

Q. 150 or 100?—100 proof.

Q. Was that delivered in Chicago?—A. Delivered in Chicago.

Q. So that in taking out the freight and the cooperage, it would amount to \$1.10, wouldn't it?—A. No, amount to about \$1.22.

Q. Was the freight and cooperage only eight cents a gallon?—A. The cooperage don't amount to more than two cents.

Q. The cooperage on a barrel is about \$5.75.—A. No, no, not on this kind, cooperage never used that kind of cooperage.

Q. It was \$1.20, you say?—A. Maybe about \$1.22 or \$1.23.

Q. That was cheaper than you could produce the stuff and pay the tax?—A. Yes, cheaper than I could.

Q. Well, than any distillery?—A. I don't know about any distillery.

Q. Can you produce any brandy for 12 cents a gallon?—A. It has been so.

Q. Of that quality?—A. The quality was not worth that much, it was regular quality, this quality less than regular quality.

Q. Could you buy it regular, that quality, on the market, tax-paid for \$1.20?—A. No.

Q. Was that Kosher also?—A. Didn't ask no questions on that there particularly, but I know it that I got it for.

Q. It was for Kosher brandy?—A. What I mean that has been tax paid on that brandy, that would be Kosher.

Q. Now, did I ask you about the tax?—A. That Kosher brandy? No, it was not.

Q. It was not Kosher brandy?—A. No.

Q. That answers my question; now, what barrel was it that had an unlawful stamp on it with only two tacks put in it, when was that?—A. I cannot tell you which barrel, if I would see the barrel I would show it to you.

Q. Well, I mean about what time?—A. Right on the beginning.

Q. Was that a regular revenue stamp?—A. That was an old, wholesale liquor dealer's stamp.

Q. Not the proper sort?—A. Not the proper sort.

Q. You received that into your place, did you?—A. Well, what he brought it in.

Q. You accepted it?—A. I accepted it.

Q. And you knew it?—A. I knew it.

Q. Will you look at this letter which is dated June 8th, 1909, and state in whose handwriting that is (handing letter to witness)?—A. This is my handwriting (Examining letter).

Q. This is a letter to Mr. Frindel, isn't it?—A. I wrote to Mr. Frindel, yes.

Q. Now, what do you mean down there at the last when you say, "In St. Louis, there is Thanks to God, also a distillery."—A. That is merely an expression, that is merely an expression, it is in St. Louis there is a distillery and the Hudson people are there.

Q. Had you been buying from the St. Louis people?—A. No.

Q. How did you know their price?—A. I heard so, I wrote to them that if that was the truth, I heard or not—

Q. Now, in June, 1909, the Illinois Fruit Distillery was closed up, wasn't it, they were not running that month?—A. No, No.

Q. Did you during that month buy from St. Louis or Hudson?—A. No, during that month Frindel sent to me in here that I shall get the two barrels which had been sent in Schreiber's name and I did not want to have them, and I told him I will take in kegs or I will take in some goods regularly stamped goods, I did not want no other kind.

Q. Those two barrels were shipped from Hudson, is that it, the two barrels you spoke of there came from Hudson, New York, is that right?—A. I don't know from where they came there, I don't know where they came from.

MR. PARKIN. I think that is all.

Redirect examination by Mr. McEWEN:

Q. What was there about that arson case in the Criminal Court?—A. I have given over my store here, had a store, I went away to remain attending to business; then I have given over my store to my former clerk who worked for me, I sold him the store and then I borrowed that \$700.

Q. You loaned them \$700?—A. Yes, they did not pay me the \$700, that was short, one of the fellows moved in there with the wife, and they took out all the goods from there, and they wanted to throw the man out too, and he made a fire and he was caught, and he had an insurance policy for his little furniture, what he had there probably worth \$50, and he insured it in a thousand, and then when he

was arrested he went over after he was pulled, and he went over to a lawyer and he says, "What do you want to have any trouble from Shapiro, say that he told you to make a fire and he will pull you out from trouble." And so he did, he comes up to me and he said, "If you don't help me get out of the trouble" he said, "I shall tell on you." I was indicted.

Q. You were tried in the Criminal Court?—A. Tried in the Criminal Court and found not guilty in ten minutes, thrown out by the court.

Q. What became of the other men?—A. How?

Q. What became of the other men who made the fire?—A. They have not sentenced him for they made an agreement with the State's Attorney for them to turn State's Evidence and they will prove me, and let me out.

Q. And you were acquitted on that immediately?—A. Of that immediately.

Q. These five barrels, I will ask this question, what was the highest proof of the Illinois Fruit Distillery goods ever made?—A. I believe 165, that is the highest proof they have made, the most goods they made 150.

Mr. McEWEN. I think that is all.

Mr. PARKIN. That is all.

The COURT. Just one moment, is your son running your store now?

A. Yes, sir.

The COURT. Is it his place now?

A. Yes, sir.

The COURT. When did you turn it over to him?

A. The 12th of September.

The COURT. The house where you live is the house that you speak about as being worth that

much, you don't live in that house that you offered for sale?

A. No.

The COURT. Have you made a conveyance of any other property to anybody within the last six or eight months or a year?

A. What do you mean by the word "conveyance."

The COURT. Turning it over to anybody or deeding any property or selling anybody any property?

A. No, I just borrowed of the same house \$6,000 for my son's father-in-law to put up with the Government.

The COURT. The only thing you had was this store and that house?

A. Store and that house, and I had the business, I had \$5,000 I owed on that house, that time only \$5,000, I had the business, and I give to my son what I feel myself right and the rest I leave for me.

The COURT. That is all.

BENJAMIN SHAPIRO, called as a witness on behalf of the defendant, having been first duly sworn, was examined by Mr. McEwen and testified as follows:

Q. What is your name?—A. Ben Shapiro.

Q. Speak up so that we can all hear you back here, where do you live?—A. 1244 West Taylor.

Q. Are you any relation to David Shapiro?—A. A brother.

Q. How old are you?—A. 29.

Q. Married?—A. Yes.

Q. How long have you been in America?—A. Nine years.

Q. And have you ever worked in your brother's place of business?—A. When I came over in the

beginning I used to work there, but not the last year.

Q. You went to work when you came over here first, for your brother?—A. Yes sir.

Q. In the liquor business?—A. Yes.

Q. Do you know how to mix liquor, mix blends?—A. Not very much.

Q. How?—A. Not very much.

Q. Not very much?—A. Not very much.

Q. What were you doing over there during the time that the Illinois Fruit Distilling Company was selling liquor over there?—A. General work.

Q. What is general work?—A. Bottling and corking and selling at the counter.

Q. Selling in the store, you mean?—A. Yes.

Q. Did you have anything to do with the buying of that liquor?—A. No sir.

Q. Or anything to do about looking after the stamps?—A. No sir.

Q. And you had no interest in the business?—A. No sir.

Q. Just getting your wages?—A. That is all.

Q. Never pulled any stamps off the barrels?—A. No sir.

Q. Never saw any pulled off?—A. No.

Mr. McEWEN. That is all.

Cross-examination by Mr. PARKIN:

Q. You were there when Bronstein made his deliveries?—A. What is that?

Q. Were you there when Bronstein brought barrels?—A. Sometimes I was there.

Q. You saw it emptied?—A. Yes sir.

Q. Saw the barrels taken out?—A. I did not pay no attention to that.

Q. Did you see where the barrels went?—A. I know they rolled out barrels.

Q. Did you ever see them destroy any stamps?—A. No.

Q. What was your idea as to where the stamps went to?—A. I don't know, I don't know anything about that.

Q. You mean you didn't know what the stamp meant, did you know what the stamp meant on there?—A. I know a stamp on the barrel means that the tax was paid on that, it was a Government stamp.

Q. Did you know anything about destroying stamps?—A. No.

Q. They never destroyed stamps over there?—A. No.

Mr. PARKIN. That is all.

PETER BIERSKY, called as a witness on behalf of the defendant, having been first duly sworn, was examined by Mr. McEwen and testified as follows:

Q. What is your name?—A. Peter Biersky.

Q. Where do you live?—A. I live at 433 South Irving Avenue.

Q. What is your present occupation?—A. My occupation is book-keeper and general manager of the liquor business of Jacob F. Shapiro.

Q. That is the young man?—A. Yes, sir.

Q. When did your work begin in that connection?—A. I started last 16th of May with D. Shapiro and I retained my position with the young Shapiro when he took over the business.

Q. What do you do over there?—A. Same capacity.

Q. Keep books?—A. Yes sir, I started there a book system.

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Q. Before that what was your occupation?—A. I was with the Daily Jewish Courier, general manager and advertising manager.

Q. Working for a newspaper?—A. Yes, six years and a half, yes.

Q. Were you there at the place of business last year when Bronstein was there with Weiss talking about money to settle with the Government?—A. I was there when Mr. Bronstein came up once to talk to Mr. Shapiro and Mr. Shapiro did not want to talk to him at all and I spoke to him and he told me that Mr. Shapiro will have to give \$5,000 and I asked him why he asked \$5,000 and he said, "Well, I want to tell you something with \$5,000 I can do much."

Q. I did not catch that?—A. He told me that when Shapiro will give him \$5,000 he will go back to Baltimore, and I sent a telegram, he has a friend of his, he will go to Washington and he will settle the case for Shapiro and for himself.

Q. Well, what did you say about that, what was said there?—A. I said to him that Mr. Shapiro would not give any money except when he will have to give to the Government.

Q. Did you say anything about Mr. Shapiro's paying a \$5,000 fine?—A. I told him—that was with Mr. Bronstein, that was Mr. Peter Sissman, and Mr. Frindel, and also they came over on the same proposition, that Shapiro shall give them \$5,000, and I told them that Shapiro only will have to pay a fine, because I understood that the Government generally is settling this matter on a money basis, I find out very many cases like it, it is always settled, never was prosecuted cases like this, and I said this, "We will have to pay the

\$5,000, or we will not go to give it to any lawyer or you people any money."

Q. Have you added up these various tickets (indicating) ?—A. Yes sir.

Q. Made a computation of the—A. Yes sir.

Q. —different checks?—A. Yes sir.

Q. Now in possession of the District Attorney?—A. Yes sir.

Q. As a matter of convenience, I will ask you to look at this document marked "Defendant's Exhibit 8 for identification" and say if those are your figures, the tabulation of the different checks?—A. Yes sir.

Q. And the footing is correct to the best of your ability?—A. Of my knowledge.

Q. And have you made any tabulation regarding the amount of brandies and liquors bought from there different concerns during the period that he purchase from the Illinois Fruit Distilling Company?—A. Yes sir, I wrote to each and every firm that they had done business with.

Q. Did you tabulate the number of gallons that you got?—A. No, I have not got a tabulation of that, I think they bought pretty near the same, maybe it is a little different.

Q. Did you make a tabulation of the amount entered in the Government book?—A. Yes sir.

Q. During this period?—A. Yes sir.

Q. I show you two sheets, and ask that they be marked "Defendant's Exhibit 9 for identification."

(The papers were marked as requested.)

Q. Are these your figures, your compilation?—A. Yes sir, they bought tax paid goods from the Illinois Distillery from Frindel and Hudson.

Q. During that time?—A. During that time.

Q. You have entered it here correctly and footed it correctly?—A. Yes sir.

Q. Were you present at the time the business was transferred to Jacob F. Shapiro, the son?—A. Yes, sir.

Q. What was the date of that?—A. It was the 12th of September to the 15th, it took three or four days.

Q. That was before the young man was indicted?—A. Yes, before he was indicted.

Q. And at that time he had recently got married?—A. Yes, sir; married about that time.

Cross-examination by Mr. PARKIN:

Q. The transfer of the property from David to Jacob Shapiro was subsequent to the indictment of David?—A. No, that was not, that was more in December—

Q. Was it subsequent?—A. It was, yes, it was many months after.

Q. Well, many months, he was indicted in May, wasn't he?—A. Yes, this was in September.

Q. The transfer was the 12th of September?—A. Yes, sir.

Q. About four months?—A. Yes, sir.

Mr. PARKIN. That is all.

Re-direct examination by Mr. McEWEN:

Q. I want to ask Mr. Biersky another question. Have you gone over these checks? (Indicating)—A. Yes, sir.

Q. Which have been in the custody of the District Attorney taken from the defendant Shapiro?—A. Yes, sir.

Q. To ascertain during what periods of time payments were made for goods?—A. Yes, sir.

Q. You have a tabulation here?—A. Yes, sir.

Q. Defendant's Exhibit 10, is that a statement of the facts?—A. Yes, sir.

Q. A tabulation from the checks?—A. Yes, sir.

Q. Showing twenty-six weeks in which payments were made?—A. Yes, sir.

Mr. McEWEN: With the possible exception of a statement to be compiled regarding the purchases of liquors from distilleries, I think that is all that we care to show. We had some character witnesses, but I assume that the court can judge character from the witness better probably than from what people might say. We have a number of witnesses with whom the defendant has dealt, who will testify to fair business dealing and general good reputation, but it mostly a negative reputation as almost every reputation is. With the exception of a table showing just how many gallons were purchased during these years, indicating that there was no great falling off in purchases from the distillery, why I think that is all the evidence we have to show to the court.

(Which was all the evidence offered on the hearing of the above entitled cause.)

APPENDIX "H."

Affidavits in opposition to petition to release mandate. (Omitted item No. 8.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

United States *v.* David Shapiro, No. 1777; District
Court No. 4451.

United States *v.* Abraham Tucker, No. 1776; Dis-
trict Court No. 4538.

Charles A. Buell, being first duly sworn, on oath deposes and says that he was, in the month of January, 1911, and still is a deputy clerk of the United States District Court for the Northern District of Illinois, and that a part of his duties as said deputy clerk of the district court consists in extending and engrossing upon the records of the district court aforesaid the rulings, orders and judgments made by the judges of the district court aforesaid.

And this affiant further says that he extended upon the records certain rulings, orders and judgments in the cases of United States *v.* David Shapiro, No. 4451, and United States *v.* Abraham Tucker, No. 4538; that he was not personally pres-

ent before the district court of the United States when any of said rulings, orders or judgments were made and that his only source of information, from which said rulings, orders and judgments were extended upon the records of the district court of the United States, was and is contained in the notes and minutes made by Joseph O'Sullivan, minute clerk for Honorable Kenesaw M. Landis, one of the judges of said district court, and that all orders and judgments extended by this affiant upon the records of said district court were made after reference by this affiant to the notes and memoranda made by the said Joseph O'Sullivan, regarding the cases aforesaid, and to no other data.

And this affiant further states that he has examined the affidavit made herein by the said Joseph O'Sullivan, and that the notes and memoranda therein contained are true and correct copies of the original notes and memoranda made by the said Joseph O'Sullivan, as minute clerk, in respect to the two cases aforesaid, the originals of which are now on file in the clerk's office of the said district court, and from which said rulings, orders and judgments were by this affiant extended and engrossed upon the records of said district court.

And further this affiant sayeth not.

CHAS. A. BUELL.

Subscribed and sworn to before me this 12th day of April, 1912.

[SEAL]

T. C. MACMILLAN,

Clerk.

(Endorsed:) Filed Apr. 12, 1912. Edward M. Holloway, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

United States *v.* David Shapiro, No. 1777; District
Court No. 4451.

United States *v.* Abraham Tucker, No. 1776;
District Court No. 4538.

Joseph O'Sullivan, being first duly sworn, on oath deposes and says that he is a deputy clerk of the district court for the Northern District of Illinois, and that for several years past he has served as minute clerk for Judge Kenesaw M. Landis, one of the judges of said court; that as such minute clerk it has always been and is a part of his duties to note and record the rulings, orders and judgments of said judge of the district court; that it is and for several years past has been his custom and practice to make a note and record of said rulings, orders and judgments of said court in the form of memoranda upon the printed motion slips of the district court, which slips with his memoranda thereon are by him transmitted to Charles A. Buell, deputy clerk of the said district court, by whom said rulings, orders and judgments of said judge of the district court are engrossed upon the records of the district court.

And this affiant further says that he was personally in court and acting as minute clerk for Judge Kenesaw M. Landis, as aforesaid, on the following days: January 3, 1911; January 12, 1911; January 13, 1911; January 20, 1911; and January 23, 1911; and that on the dates aforesaid certain proceedings were had in cases of the United States *v.* David Shapiro, No. 4451, and United States *v.* Abraham Tucker, No. 4538; that as a part of his,

affiant's, duties as minute clerk, he listened attentively to motions made by counsel representing the government and the defendants in these cases, and then and there as such minute clerk recorded and noted all such motions, rulings, orders and judgments as were made in the above named cases in manner and form aforesaid.

And this affiant further says that the following are true, exact and correct copies made by him of his original records and memoranda, so entered by him on the dates aforesaid in connection with these cases of the United States *v.* David Shapiro, and the United States *v.* Abraham Tucker, aforesaid, and truly and correctly showed the proceedings, rulings, orders and judgments had in connection with the said cases on the dates aforesaid:

United States District Court, Northern District of
Illinois.

Cause No. 4451. (Date) Jany. 3, 1911.

Title of Cause: U. S. *v.* David Shapiro.

Brief Statement of Motion: For Trial.

Plea Not Guilty withdrawn. Plea Nolo Contendere ent'd. Hearing set for Jany. 17th.

United States District Court, Northern District
of Illinois.

Cause No. 4451. (Date) Jany. 20—1911.

Title of Cause: U. S. *v.* David Shapiro.

Brief Statement of Motion: L Hrg Plea Nolo Contendere.

Government elects to stand on Counts 4, 9, 12. Nolle pros as to the others. Evidence heard & advisement. Cause cont'd to Monday Jany 23rd for disposition.

United States District Court, Northern District
of Illinois.

Cause No. 4451. (Date) Jany. 23—1911.

Title of Cause: U. S. v. David Shapiro.

Brief Statement of Motion: Disp'n on plea Nolo
Cont.

Finding of Guilty. Sentence two years in Leavenworth & Fine of \$10000.00 & Costs.

Mo. to vacate Sentence ent'd & cont'd Two weeks.

United States District Court, Northern District
of Illinois.

Cause No. 4538. (Date) Jany. 3—1911.

Title of Cause: U. S. v. Abraham Tucker.

Brief Statement of Motion: For Trial.

Plea not Guilty withdrawn. Plea of Nolo Contendere entd. & Hearing Set for Jany. 6th.

United States District Court, Northern District of
Illinois.

(Date) Jany. 12, 1911.

Cause No. 4538.

Title of Cause: U. S. v. Abe Tucker.

Brief Statement of Motion: Disposition on plea.

Evidence on plea of Nolo Contendere ptly heard
& Contd. to Jany. 13—11 a. m. for Disposition.

United States District Court, Northern District of
Illinois.

(Date) Jany. 13, 1911.

Cause No. 4538.

Title of Cause: U. S. v. Abraham Tucker.

Brief Statement of Motion: Disp'n on plea Nolo
Contendere.

Evidence Concluded & advisement.

United States District Court, Northern District of
Illinois.

(Date) Jany, 23, 1911.

Cause No. 4538.

Title of Cause: U. S. v. Abraham Tucker.

Brief Statement of Motion: Disposition on Nolo
Cont.

Finding of Guilty. Sentence Eighteen months
in Leavenworth Pen. Fine of \$2500.00 & Costs.

And further affiant sayeth not.

JOSEPH O'SULLIVAN.

Subscribed and sworn to before me this eleventh
day of April, 1912.

[SEAL] T. S. MacMILLAN, *Clerk*.

(Endorsed:) Filed Apr. 12, 1912. Edward M.
Holloway, *Clerk*.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

United States *v.* David Shapiro, No. 1777: District
Court No. 4451.

United States *v.* Abraham Tucker, No. 1776;
District Court No. 4538.

Harry A. Parkin, being first duly sworn, on oath
deposes and says that he is an Assistant United
States Attorney for the Northern District of Illi-
nois, and that as such Assistant United States At-
torney he had personal and immediate charge, on
behalf of the government, of the cases of United
States *v.* David Shapiro, No. 1777, and United
States *v.* Abraham Tucker, No. 1776, recently pend-
ing in the district court of the United States for

the Northern District of Illinois, and there known as *United States v. David Shapiro*, No. 4451, and *United States v. Abraham Tucker*, No. 4538.

And this affiant further says that an indictment was filed in the district court in the case of the *United States v. David Shapiro*, No. 4451, June 21, 1910; that thereafter, namely, on June 24, 1910, the defendant, David Shapiro, pleaded not guilty to said indictment before Honorable Kenesaw M. Landis, judge of the district court aforesaid;

That on October 5, 1910, an indictment was filed in the district court in the case of the *United States v. Abraham Tucker*, No. 4538; that thereafter, namely, on the 19th day of October, 1910, the defendant, Abraham Tucker, pleaded not guilty to said indictment before Honorable Kenesaw M. Landis, judge of the district court aforesaid.

And this affiant further says that subsequent to the above proceedings and shortly prior to the 3rd day of January, 1911, Willard M. McEwen, for and on behalf of David Shapiro aforesaid, called upon this affiant in the district attorney's office in the Federal Building, at Chicago, Illinois, and asked this affiant in substance what, if any, arrangement or agreement could be made to effect a disposition of the case of said Willard M. McEwen's client, David Shapiro; that this affiant thereupon informed the said Willard M. McEwen, in substance and effect, that the case of David Shapiro was before, and entirely within the hands of, the district court of the United States for disposition, and that this affiant either personally or as Assistant United States Attorney, as aforesaid, could make no promise or enter into no agreement to make any recommendation therein regarding the

disposition of the same; that thereupon said Willard M. McEwen suggested entering a plea of *nolo contendere* on behalf of the said David Shapiro, and that this affiant then said in substance to said Willard M. McEwen "You know the court can send Shapiro to the penitentiary on that plea and you will have to take your chances in case you enter it," to which the said Willard M. McEwen replied "I don't believe he will send that old man to the penitentiary."

And this affiant further states that said Willard M. McEwen did not then definitely and positively state that he would enter such plea of *nolo contendere* on behalf of the said David Shapiro, but on the 3rd day of January, 1912, on which said day the case of the United States *v.* David Shapiro, No. 4451, was called before Judge Landis, said Willard M. McEwen appeared before the district court as counsel for said David Shapiro and then and there stated to the court that he wished to withdraw the plea of not guilty theretofore entered in said case by the said defendant and enter a plea of *nolo contendere*; that thereupon the court set the case for hearing at a subsequent date, and on the 20th day of January, 1911, the testimony of numerous witnesses for the government and on behalf of the defendant, David Shapiro, was heard before the said Judge Landis, as more fully appears from the accompanying affidavits filed herewith, and that on the 23rd day of January, 1911, the court, having heard evidence as aforesaid entered an order upon the motion of this affiant finding the defendant, David Shapiro, guilty, and thereupon, on the date last aforesaid, sentenced the defendant, David Shapiro, to be confined in the

United States penitentiary at Leavenworth, Kansas, for two years and to pay a fine of \$10,000.

This affiant further states that on the 3rd day of January, 1911, Patrick H. O'Donnell, duly appearing as attorney for Abraham Tucker in the case of the United States *v.* Abraham Tucker, No. 4538, when the said case was called before Judge Landis of the said district court, stated that he wished to withdraw the plea of not guilty theretofore entered in said case by said Abraham Tucker and enter a plea of *nolo contendere* in said case; that said action on the part of said Patrick H. O'Donnell was made without any agreement, arrangement or understanding of any kind as to the disposition to be made of said case between said Patrick H. O'Donnell and this affiant, and that this affiant did not know definitely that such plea would be entered until in fact such action was taken; that upon the entering of said plea of *nolo contendere* on behalf of said Abraham Tucker the court set a day for hearing the evidence in the case, and that on the 12th and 13th days of January, 1911, the testimony of numerous witnesses for and on behalf of the United States, and for and on behalf of the defendant, Abraham Tucker, was heard by Judge Landis, as more fully appears from the accompanying affidavits filed herewith; and thereafter, on the 23rd day of January, 1911, the said Judge Landis, sitting in the district court aforesaid, entered an order upon motion of this affiant finding the defendant, Abraham Tucker, guilty and sentenced him to be confined in the penitentiary at Leavenworth, Kansas, for eighteen months and to pay a fine of \$2500.

And this affiant further states that he did not at any time preceding the pronouncing of sentence as aforesaid upon the said David Shapiro and upon the said Abraham Tucker, nor at the time sentence was imposed upon the said defendants, offer, suggest, nor in any manner agree on behalf of the United States to permit said plea of nolo contendere to be entered in the cases aforesaid or either of them upon any promise, understanding or pretext that such action should or could be an offer on behalf of said defendants to submit themselves to fine only, but, on the contrary, this affiant warned the said attorneys for said defendants that, if such plea of nolo contendere were entered, it must be at their own motion and upon their own judgment and at the peril that their clients, the defendants aforesaid, would be sentenced to imprisonment in the penitentiary, and the attorneys for the defendants aforesaid stated to this affiant that they also so understood the effect of entering pleas of nolo contendere to be.

And further this affiant sayeth not.

HARRY A. PARKIN.

Subscribed and sworn to before me this 12 day of April, 1912.

[SEAL]

WILLIAM A. SMALL,
Notary Public.

(Endorsed:) Filed Apr. 12, 1912.

EDWARD M. HOLLOWAY, *Clerk.*

APPENDIX " I. "

Affidavit in reply to " affidavits in opposition " to release of
mandate. (Omitted item No. 9.)

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE
SEVENTH DISTRICT.

United States *vs.* David Shapiro, 1777; District
Court No. 4451.

Willard M. McEwen, being first duly sworn, deposes and says that prior to the indictment in the court below, he was employed by the defendant to act as his attorney in his defense, and prior to the 3rd day of January, 1911, affiant called upon Harry A. Parkin, in his office in the District Attorney's Office, in the Federal Building, at Chicago, Illinois, and had a conversation with said Parkin regarding the trial and disposition of said cause; that affiant stated to said Parkin that he, affiant, thought that equitably and substantially, said David Shapiro had accomplished a settlement of the said cause, under provision of the Federal Statute regarding settlements in revenue cases; that he had deposited Twelve Thousand Dollars (\$12000) with the local revenue offices, which had been transmitted to Washington and covered into the United States Treasury; that, as affiant was informed, the subject of the settlement of the case against David Sha-

piro and a number of others, had been taken up before the Collector of Internal Revenue and the Treasurer of the United States and the solicitor for the Treasury, and all had approved the settlement; that in effect the approval, by the solicitor of the Treasury, who was a member of the office of the Attorney General, by appointment from him, was a compliance with the statute, and that the technical writing out of an opinion and approval by the Attorney General, ought not to stand in the way of treating the case as settled; that similar cases of frauds upon the Revenue Department where men were infinitely more guilty had been settled for less money, and that it was a matter of cruelty to inflict any extreme penalty on the defendant, Shapiro.

Said Parkin stated that the matter could have been settled if it had been taken up earlier, in all probability, without question; that as he understood it, Shapiro was slow in producing the necessary money for a settlement and let the matter drift along and had not taken the case seriously; that Attorney General Wickersham had sent his then assistant, now Senator Kenyon, to Chicago, to investigate the series of cases of which the defendant, Shapiro's was one, and that said Kenyon had had an interview with Judge Landis, and that following such interview Kenyon had made an unfavorable report to the Attorney General; that he, said Parkin, was unable to do anything; that everything was in the hands of Judge Landis, who was not disposed to pay any attention to recommendations of the District Attorney; that the District Attorney's office had no feeling in the matter and would be satisfied with anything that the Judge did. Affiant

then stated he supposed it would be useless to make a defense in the United States District Court.

That affiant, in a joking way, stated that it was much more difficult to defend a case in the Federal Courts than in the State Courts; that for practical purposes the Federal Courts had a different view of a reasonable doubt, and if the Court did not entertain a reasonable doubt, the jury would not be likely to, and that as it looks as though we were up to the Judge, that I might enter a plea of *nolo contendere*.

Said Parkin did not say to affiant "You know the court can send Shapiro to the penitentiary on that plea and you will have to take your chances in case you enter it" either on that occasion or at any other time, nor did said Parkin then or at any other time warn this affiant, for said defendant, or otherwise that "if such plea of *nolo contendere* were entered, it must be at his own motion, upon his own judgment and at the peril of his clients," or that said Shapiro would be sentenced to imprisonment in the penitentiary, nor did this affiant state to said Parkin at any time that he so understood the effect of entering pleas of *nolo contendere* to so be, nor was the effect of the plea ever discussed between affiant and said Parkin.

Further Affiant sayeth not.

WILLARD M. McEWEN.

Subscribed and sworn to before me, this 18th day of April, 1912.

[SEAL]

JAMES S. McCLELLAN,

Notary Public.

(Endorsed:) Filed Apr. 18, 1912. Edward M. Holloway, Clerk.

APPENDIX "J."

Extracts from brief (pp. 5, 9) in support of petition to release
mandate. (Omitted item No. 10.)

1.

PLAINTIFFS IN ERROR HAVE BEEN ONCE IN JEOPARDY
SINCE THEY WERE CONVICTED UPON THEIR PLEAS OF
NOLO CONTENDERE AND SENTENCE IMPOSED THERE-
UPON.

2.

APPLICATION IS MADE TO THIS COURT BECAUSE OF COM-
PULSORY EFFECT OF MANDATE AND OPINION UPON THE
DISTRICT COURT AND THAT INJUSTICE BE NOT DONE.
APPLICATION PRESENTS MATTER RELEVANT TO THE
ISSUE AND THERE IS NO LACK OF DILIGENCE ON THE
PART OF PLAINTIFFS IN ERROR.

3.

ACCEPTANCE OF PLEAS OF *NOLO CONTENDERE* IS UNDE-
NIED IN FACT, THOUGH RECORD DID NOT SUFFICIENTLY
SHOW SUCH TO BE THE PROCEEDINGS SUBSEQUENT TO
THE ENTERING OF PLEAS OF *NOLO CONTENDERE*.

4.

MISTAKE IN DISTRICT COURT WAS ONE OF LAW BASED
UPON NO MISAPPREHENSION OR MISUNDERSTANDING OF
THE FACTS AND WAS NOT MADE BY PLAINTIFFS IN
ERROR.

* * * * *

If the facts now known had appeared in the
record, this court would have merely had to affirm

the judgment as to the fines and reverse as to the imprisonment, in order to conclude these cases. It is recognized in the opinion of the court that if the record had shown that pleas of *nolo contendere* had been entered and sentence imposed upon them that the proceedings would have been free from error. We quote the following language from the opinion, delivered by Judge Seaman, in these cases:

"So, it was within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission. Were the subsequent proceedings consistent with the acceptance of the plea in that view, we are satisfied that no reversible error would appear in allowance thereof."

When it is now known that the pleas were in fact accepted and that sentence was imposed thereupon the question is no longer one of difficulty.

APPENDIX "K."

Order denying petition for release of mandate. (Omitted item No. 11.)

WEDNESDAY, *April 24, 1912.*

Court met pursuant to adjournment and was opened by proclamation of erier.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. William H. Seaman, Circuit Judge; Hon. Christian C. Kohlsaat, Circuit Judge; Edward M. Holloway, Clerk; Luman T. Hoy, Marshal.

1777. David Shapiro *vs.* United States of America. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and the petition for a release of the mandate of this Court in this cause now comes on to be heard on the petition, affidavits and briefs in support of same and in opposition thereto, and on oral arguments by Mr. Elijah N. Zoline, counsel for David Shapiro, in support of said petition, and by Mr. Harry A. Parkin, Assistant United States District Attorney, in opposition thereto, and the Court having heard the same and being fully advised, it is now here ordered that the said petition for a release of said mandate be, and the same is hereby denied.

(181)



3
FILED
OCT 9 1914
JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 93.

DAVID SHAPIRO,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the
Northern District of Illinois.

SUGGESTIONS IN OPPOSITION TO THE
MOTION FOR A DIMINUTION OF THE
RECORD AND CERTIORARI.

ELIJAH N. ZOLINE,
Attorney for Plaintiff in Error.

610 Ashland Block,
Chicago, Ill.

Geo. Hornstein Co., Printer, Chicago.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

No. 93.

DAVID SHAPIRO,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the
Northern District of Illinois.

**SUGGESTIONS IN OPPOSITION TO THE
MOTION FOR A DIMINUTION OF THE
RECORD AND CERTIORARI.**

And now comes the plaintiff in error and objects to the allowance of the motion of the United States for a diminution of the record and for writs of certiorari, for the following reasons, to-wit:

First: This cause was No. 420 on the docket of this court for the October term, 1913. By stipulation of parties, entered into on or about March 26, 1913, and filed among the papers in the case, the cause was transferred to the docket of the October term, 1914. The United States, accordingly, had since the date of that stipulation at least three months

during the October term, 1913, within which to make this motion. Under Rule 14 of this court, a motion of this kind must be made at the first term of the entry of the case. The suggestion, therefore, that the United States is free from laches is without merit. The case has been in this court since January, 1913. The Government has waited until the record has been printed and brief filed for plaintiff in error before making the present motion. The motion is, therefore, made too late and should be denied.

Rule 14, U. S. Supreme Court.

Chapell v. United States, 160 U. S., 499.

Second: The documents sought to be brought here by certiorari were never offered in evidence or presented in any way to the District Court. The Government, now and for the first time, attempts to take issue in this court upon the pleas of former jeopardy filed in the court below. The matter was disposed of in the District Court upon demurrers to the pleas. (See bill of exceptions signed by Judge Carpenter on June 25, 1912; Printed Rec., 35.) Later, after the demurrers were sustained and before the opening of the case, counsel for the defendant offered to make proof supporting the pleas of former jeopardy, notwithstanding the demurrers, which admit the allegations of the pleas, but the court refused it, as appears from the following:

"Mr. Zoline: Before we proceed with the trial, on behalf of the defendant, we object to being tried here, and we claim our constitutional guaranties, former jeopardy, et cetera, as set forth in the pleas. Then, again, I notice in the 219th United States Reports there is a case that,

notwithstanding the demurrers are sustained to the pleas, you must offer evidence to sustain your point. Now, I am ready to offer that evidence, but I do not want to take the time to do so unless the court so desires, but I want the record to show that the court rules that he will not permit any evidence to be introduced touching the matters set forth in the pleas.

"The Court: The record may show that, but it seems to me that the demurrer sets up the facts.

"Mr. Zoline: And the defendant excepts to it, so he will not be presumed to have waived this point.

"The Court: Every question that is in this case will be preserved in the record." (See Printed Record, Bill of Exceptions, p. 45.)

The defendant having been deprived of the opportunity in the court below of making his proof and the case having been decided upon the several pleas of the defendant and the demurrers of the Government thereto, and the documents sought to be brought up here, not having been introduced in evidence before the District Court or brought to its attention, the motion for certiorari ought to be denied.

Holmes v. Trout, 7 Pet., 171, 210.

Third: In his brief counsel for plaintiff in error frequently refers to the decisions of the United States Circuit Court of Appeals in the cases of *Shapiro v. United States* and *Tucker v. United States*, both of these cases being reported in 196 Fed., 268, and 186 Fed., 260. The District Court filed no opinion in this case, and this being a writ of error to the District Court and not to the Court of Appeals, counsel for plaintiff in error, merely for

the sake of economy, did not have the opinion of the Court of Appeals incorporated into the transcript of the record, believing that this court would take notice of the decision as reported in the Federal Reporter. The writ of certiorari is, therefore, not necessary for the purpose of bringing up the opinion of the Circuit Court of Appeals, as this appears in the printed reports.

As to the document which is entitled, "A motion to correct the record and amend judgment," filed March 15, 1912, in the District Court, for which a certiorari is asked, it does not appear from the suggestions filed in support of the application for the writ of certiorari that said motion was ever acted upon by the court. The proceedings in the Court of Appeals on the application to release the mandate, and the various affidavits filed in support thereof and in opposition thereto in the Court of Appeals, were all had prior to the filing by the Government of the demurrers to the pleas of former jeopardy. When the demurrers were filed, the truth of the pleas was admitted and no further motion to correct the record in the District Court was necessary, because the admissions made by these demurrers in and of themselves sustain the allegations of fact made in the pleas.

The Circuit Court of Appeals refused leave to release the mandate. It filed no opinion. It may have refused this application on the ground that the proper way to raise the point was by a plea of former jeopardy. Surely no court can take away the constitutional right of a defendant to a plea of former jeopardy, if in fact he was in jeopardy.

The Government seeks to bring up here *extracts* from the brief of counsel for plaintiff in error filed in the Circuit Court of Appeals on the application for the release of mandate. It seeks to bring up a partial record, or part of a document, which is unfair to plaintiff in error.

I beg leave to present here a brief statement of the record, which may aid the court in the disposition of this motion.

The plaintiff in error, David Shapiro, referred to in this statement as defendant, was indicted in the District Court for the Northern District of Illinois, on June 21, 1910, charged with the violation of the Internal Revenue Laws of the United States. The indictment contained thirteen (13) counts. (Trans., 2.) The first four counts charged a violation of Section 3286 of the Revised Statutes; Counts 5, 6, 7 and 8, a violation of Section 3317; Count 9, a violation of Section 3318; Count 11, a violation of Section 3326, and Count 12, a violation of Section 3324, all felonies.

Count 10 charged a violation of the Act of July 16, 1892, Chapter 196 (27 Stat. L., 200), which provides no penalty for its violation, the penalty therefor being governed by Section 3456 of the Revised Statutes *imposing a fine only*. The numbers of the various sections of the statutes upon which the prosecution is based are endorsed upon the back of the indictment under the signature of the foreman of the grand jury. (Trans., 7.)

Count 13 charges a violation of Section 3455 of the Revised Statutes, which is punishable by fine only, if committed without intent to defraud the

revenue, and by fine and imprisonment if committed with such intent.

Defendant, on June 24, 1910, pleaded *not guilty* to said indictment. (Trans., 7.)

On January 3, 1911, he appeared and in the presence of the United States Attorney "*by leave of court first had and obtained*, said defendant withdraws his plea of not guilty heretofore entered herein, and being now arraigned upon the indictment filed herein against him, pleads *nolo contendere* thereto." (Trans., 9.)

On January 20, 1911, *after* the acceptance of the plea of *nolo contendere*, the United States Attorney, by leave of court entered a *nolle prosequi*, as to all counts except the fourth, ninth and twelfth, and it was thereupon ordered that the defendant be discharged from further prosecution under Counts 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13, leaving in the record only three counts, each of which charged a felony. (Trans., 10.)

The record further recites that afterwards on the same day, "This cause coming on to be heard *on defendant's plea of nolo contendere* heretofore entered herein, come the parties by their attorneys and the defendant in his own proper person, and the hearing proceeds, and the court having heard the evidence, * * * takes the cause under advisement. (Trans., 10.)

On January 23, 1911, judgment was entered by Judge Landis finding the defendant guilty and sentencing him to imprisonment in the penitentiary at Fort Leavenworth, Kansas, for two (2) years and to pay a fine of ten thousand dollars. (Trans., 11.)

Thereupon a writ of error was sued out by the defendant from the Circuit Court of Appeals for the Seventh Circuit to reverse said judgment and on January 2, 1912, an order was entered therein reversing the judgment on the ground that under the plea of *nolo contendere*, defendant could not lawfully be sentenced to imprisonment—the maximum penalty permissible under such plea being a fine only. The cause was thereupon remanded with directions either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and *proceed further in conformity with law*. The opinion of the Court of Appeals in full is as follows:

(Before Baker, Seaman and Kohlsaat, Circuit Judges.)

"*Per Curiam*: The judgment from which this writ of error is brought pronounces, upon a finding of guilty as charged in the indictment, that the plaintiff in error be imprisoned in a penitentiary for two years and pay a fine of \$10,000 besides the costs, under an indictment charging in several counts various violations of the internal revenue statutes, with a plea of *nolo contendere* tendered as the only plea thereunder. The errors assigned are identical with those assigned in *Tucker v. United States* (No. 1776), decided herewith (196 Fed., 260), and no distinction from the indictment and record of proceedings there presented and considered appears in the present case, in so far as material for decision. So the opinion and ruling therein is applicable to this writ, and the judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed further in conformity with law." (Italics ours.)

It appears from the *Tucker* case (196 Fed., 260), referred to in the above *per curiam* opinion, that the Court of Appeals held that under the indictment in *this case*, under certain counts, it was proper to take the plea of *nolo contendere*; that the taking of such plea amounted to an election on the part of the District Attorney to stand on the misdemeanor counts only. (See Point 3, 196 Fed., 267.) But inasmuch as it did not appear affirmatively from the record that the plea of *nolo contendere* had been accepted by the District Court, and as the evidence referred to in the record had not been preserved, the Court of Appeals reversed the judgment with directions either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed in accordance with law.

On February 15, 1912, the mandate of the Court of Appeals was filed. The defendant presented a petition for change of venue on the ground of prejudice of the Hon. K. M. Landis, Judge, which was denied. "Thereupon the District Attorney moved the court to reject the plea of *nolo contendere* heretofore entered in said cause, which motion was *resisted* by counsel for the defendant. * * * Thereupon the court directed that an order be entered rejecting said plea of *nolo contendere* and ruling said defendant to plead. Thereupon the court directed the Clerk to enter a plea of not guilty for the defendant, to which ruling of the court the defendant then and there duly excepted." (See first Bill of Exceptions, Trans., 16, and see court order to same effect, Trans., 11-12.)

Thereafter, by leave of court, defendant filed three

verified special pleas. The first plea filed on the 15th day of March, 1912 (Trans., 17), recites the facts above referred to as to the withdrawal of the original plea of not guilty by leave of the United States District Court, that by leave of court and *with the consent* of the United States Attorney, defendant pleaded *nolo contendere*, and "That the said plea of *nolo contendere* was then and there duly accepted by the said District Court"; that thereafter the District Attorney entered a *nolle prosequi* as to counts 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13, and that thereupon the cause came on to be heard upon said plea of *nolo contendere* and later came on for sentence upon said plea, and defendant was sentenced to the penitentiary as above set forth; that said judgment was reversed; that "while it is true that some ambiguity exists in the record * * * as written up by the Clerk * * * whether the said plea of *nolo contendere* pleaded by this defendant was accepted by the court, nevertheless, in truth and in fact, the said District Court did accept the said plea of *nolo contendere*, and acting under and upon said plea, heard evidence solely for the purpose of fixing the punishment to be imposed upon him, this defendant, and any recital in the record to the contrary or ambiguously stated is merely a misprision of the Clerk of the court, for which this defendant cannot in any way be held responsible." (Trans., 19.) The plea then recites the subsequent proceedings and claims that by reason thereof, defendant had once been in jeopardy and cannot again be placed on trial upon said indictment. In said plea the defendant specially pleaded and invoked the protection of the Fifth

Amendment to the Constitution of the United States, providing—"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (Trans., 19.)

The second special plea alleged that the defendant, in September and December, 1910, tendered to the Commissioner of Internal Revenue the sum of five thousand dollars (\$5,000) in full satisfaction and settlement of all civil and criminal liability for the offenses charged in the indictment; that the Commissioner accepted said amount and deposited same in the United States Treasury; that on December 13, 1910, he and others against whom indictments were pending deposited twenty-seven thousand dollars (\$27,000) (which included said \$5,000) with said Commissioner; that said Commissioner accepted said sum in full settlement and satisfaction of any and all claims whether civil or criminal against defendant, and that the Commissioner deposited same in the Treasury of the United States. (Trans., 21-2.)

The third special plea filed by leave of court on May 10, 1912 (Trans., 23), alleges the same proceedings set up in the first plea of former jeopardy leading up to the original judgment and then recites that a writ of error was sued out as above set forth, which was on February 3, 1911, made a supersedeas; that on May 2, 1911, the order of supersedeas was modified to authorize the United States to enforce the collection of the judgment so far as the fine of ten thousand dollars (\$10,000) was concerned; that execution was issued thereon and garnishment proceedings were commenced against several banks and against the Assistant Treasurer of the United States

at Chicago; that upon a hearing upon the answer of one of the garnishees, it appeared that a draft on the said Treasurer of the United States for five thousand dollars (\$5,000) payable to defendant, was in possession of the Collector of Internal Revenue at Chicago, and said proceedings were dismissed as to said garnishee; that said five thousand dollars (\$5,000) was never returned to the defendant, and was in the hands of the United States and its authorized officials. Wherefore defendant alleges the judgment against him as to the fine (which was the only valid part of the judgment) has been partly executed and that he has once been in jeopardy. (Trans., 23-27.) The defendant in this plea also claims the protection of the Fifth Amendment to the Constitution of the United States. (Trans., 27.)

General demurrers were interposed by the Government to each of said special pleas (Trans., 35, 36, 37), which demurrers and each of them were sustained by the District Court and exceptions to said ruling were duly taken by the defendant. (See second Bill of Exceptions, Trans., 35.)

The defendant Shapiro was thereupon placed upon trial before a jury, over his objection (Trans., 45), and notwithstanding the demurrers confessing the pleas, the defendant offered to introduce evidence in support of his respective pleas of former jeopardy, which evidence was rejected by the District Court on the ground that the facts set forth in the pleas were admitted by the demurrers and that, therefore, it was not necessary for the defendant to introduce evidence in support of same. (Trans., 45.)

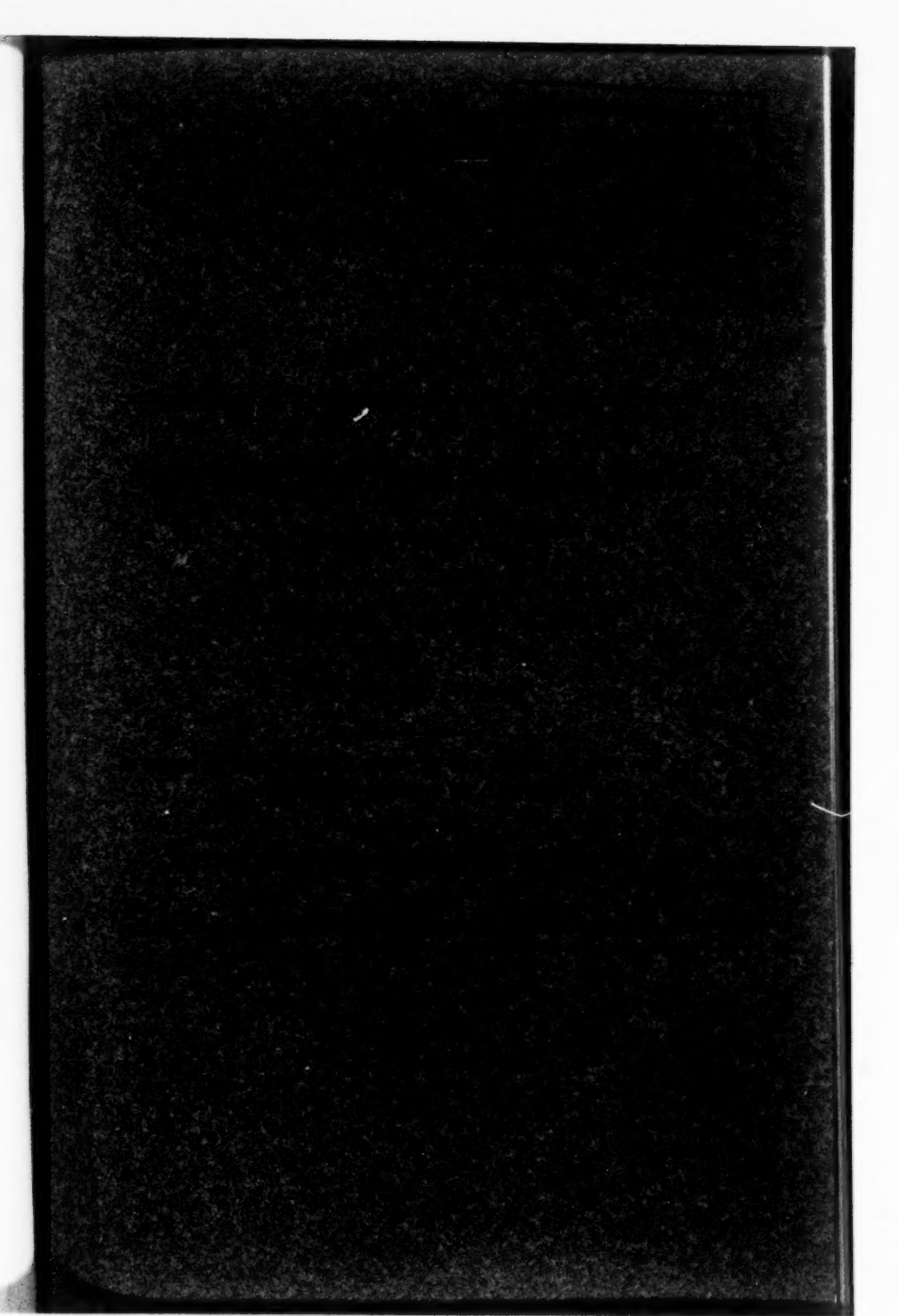
Thereupon the Government introduced evidence in

support of the indictment and the defendant introduced none. The defendant moved for a direction to the jury to find him not guilty, which was overruled and exception taken. (Trans., 112.) The defendant was found guilty by the jury and was sentenced on the verdict to imprisonment in the penitentiary for two (2) years and to pay a fine of five thousand dollars (\$5,000), to reverse which judgment a writ of error was sued out in this court.

Respectfully submitted,

ELIJAH N. ZOLINE,

Attorney for Plaintiff in Error.



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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID SHAPIRO, PLAINTIFF IN ERROR,	} No. 93.
v.	
THE UNITED STATES.	

AN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

The Solicitor General, on behalf of the United States, moves the court to dismiss the writ of error in this case on the following grounds:

I. That this court has no jurisdiction to question or interpret, on a writ of error sued out directly to a District Court, a mandate and opinion of a Circuit Court of Appeals upon a former writ of error in the same case.

II. That plaintiff in error may not be heard to complain of that mandate and opinion which he himself invited.

III. That this court has no jurisdiction to question or interpret, upon such a writ of error, *the action* of a District Court *in giving effect to the decision* of a Circuit Court of Appeals.

It is believed that preliminary consideration of these questions will make an exhaustive examination of the merits of the case unnecessary.

STATEMENT.

Although sued out direct to the District Court of the United States for the Northern District of Illinois, under section 238 of the Judicial Code, to review a criminal conviction under the revenue laws, the present writ of error really involves a review also of proceedings had in the Circuit Court of Appeals for the Seventh Circuit. The case, after original judgment and sentence in the District Court, was taken by Shapiro to the Court of Appeals on assigned error (among others) that the judgment was not supported by a valid plea. The judgment was reversed and the case sent back for further proceedings. Upon the second trial, he interposed pleas of former jeopardy; and it is upon the constitutional question presented by the District Court's having sustained demurrers to those pleas that he claims a hearing in this court. Further details will find their place in the succeeding argument.

ARGUMENT.

I.

This court has no jurisdiction to question or interpret, on a writ of error sued out directly to a District Court, a mandate and opinion of a Circuit Court of Appeals upon a former writ of error in the same case, which constitute "the law of the case," not only for the District Court, but for this court as well.

The constitutional question upon which Shapiro comes to this court is former jeopardy. The Dis-

trict Court, at the second trial, in sustaining the demurrer to his once-in-jeopardy plea, did so in conformity with the mandate and opinion of the Circuit Court of Appeals. Shapiro had assigned as error in his writ of error to that court that:

It does not appear in the record that the plea tendered on behalf of the defendant was either accepted in fact as a *nolo contendere* plea, or substantially so treated * * * in the subsequent proceedings.

(196 Fed. 267, 268—the opinion in *Tucker v. United States*, 196 Fed. 260, having been adopted; Appendix “C,” p. 21, Suggestion of Diminution.)

Specifically upon that assignment, the Court of Appeals had held that—

The record, therefore, furnishes no ground to support the judgment as resting on acceptance of the plea, * * * thus leaving it unsupported for want of either of the authorized pleas to the indictment.

(196 Fed. 260, 268; Appendix “C,” p. 21, Suggestion of Diminution.)

The Circuit Court of Appeals had ruled unequivocally that the record did not show an accepted plea and that upon such proceedings no valid judgment could be predicated. The Court of Appeals may have erred in its ruling. It may have formed it upon an incomplete or incorrect basis of fact. But there it stood, unreversed and unrestricted, holding that no valid proceedings had been had, and reopening the case all the way back

to the pleading of the accused. It was not for the District Court to reverse that ruling, nor to annul its meaning by altering the facts upon which it was expressly based.

In *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, an appeal was taken directly to this court, upon a jurisdictional ground, from a decree entered by a Circuit Court pursuant to a mandate of the Circuit Court of Appeals reversing an earlier decree, and ordering further proceedings and a new decree in conformity with its opinion. This court said (p. 37) :

Apart from these considerations, however, this is an appeal from a decree entered by the Circuit Court in conformity with the mandate from the Circuit Court of Appeals for the Eighth Circuit. That court took jurisdiction, passed upon the case, and determined by its judgment that the appeal had been properly taken. *If error was committed in so doing, it is not for the Circuit Court to pass upon that question. The Circuit Court could not do otherwise than carry out the mandate from the Court of Appeals, and could not refuse to do so on the ground of want of jurisdiction in itself or in the appellate court. * * ** And no rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court, can not be maintained * * *. If the Court of Appeals erred, or if, for any

reason, its judgment could be held void, the appropriate remedy lay in a *certiorari* from this court to that court.

This court then calls attention to the fact that the appellant did apply to it for a writ of *certiorari* and that the application was denied.

In *Brown v. Alton Water Co.* 222 U. S. 325, 331, and 332, this court said:

It is not disputable that the action of the court below on the question of jurisdiction was the necessary result of the decision of the Circuit Court of Appeals, *since it was the imperative duty of the Circuit Court to give effect to that decision.* As consequently it will be impossible to reverse for error the action of the Circuit Court without reversing the foundation upon which the action of that court rested, that is, the dominant decree of the Circuit Court of Appeals, it must result that the decree can only be reversed by reviewing and reversing the decree of the Circuit Court of Appeals. That decree, however, not being before us, and moreover, as the statute gives no power to this court to review a decree of a circuit court of appeals merely because of the existence of a question of jurisdiction, it comes to pass that we may not by indirection do that which we can not do directly, and hence the decree of the Circuit Court, under the conditions here existing, is not susceptible of being reviewed.

The fundamental mistake which underlies the argument by which it is sought to sus-

tain the right to a direct review consists in failing to distinguish between the mere methods of review provided by the Act of 1891, and the distribution made by that act of original and appellate judicial power. More immediately the fault of the argument consists in disregarding the duty of the Circuit Court to apply the law of the case arising from the decision of the Circuit Court of Appeals, an error hitherto pointed out in *Aspen Mining & Smelting Company v. Billings*, 150 U. S. 31. * * *

Application of these principles to the Shapiro case is not difficult. Shapiro can not develop jeopardy out of the first proceedings had in the District Court, without modifying the action of the Circuit Court of Appeals, nor unless he can find in the first proceedings an accepted and valid plea. To do this, he must amend the record, and, to that extent, amend the court's action itself. Realizing this, he filed, the same day that he filed his plea of former jeopardy, a motion to amend the first judgment of the District Court to show that it was upon an accepted plea. And the next day he filed in the Court of Appeals a petition to "release" its mandate, that the court below might thus amend its judgment. (The motion, petition, and order of the Court of Appeals denying the same are, respectively, in the Suggestion of Diminution, Appendices "D," "E," and "K," pp. 41, 44, and 181.) Had he accomplished said release and amendment, his next step must have been a rehearing before the Court of Appeals,

and a modification or reapplication of its judgment and mandate. This was defeated by the denial of his petition. As a basis for his claim of double jeopardy, he undertakes in this court, by argument merely, to effect the revision of the former proceedings, unsuccessfully attempted in a formal manner, before two lower courts. Waiving the question of estoppel (Point "II," *infra*), this court will not review proceedings upon such a basis. The decision of the Court of Appeals, that there was no valid plea or judgment, stands as the law of the case, binding upon the District Court, and, under this *direct* writ of error upon this court as well.

In *Metropolitan Water Company v. Kaw Valley District*, 223 U. S. 519, 521-522, 524, this court said:

While in form this is an appeal from the decree of the Circuit Court for the District of Kansas, it is really an effort to review a decision of the Circuit Court of Appeals of the Eighth Circuit. From the statement of facts it is manifest that in dismissing the bill the Circuit Court merely applied the ruling that the petition for the appointment of commissioners was not the institution of a "suit" within the meaning of the Removal Act. If there was no suit which could be removed, it was not possible to maintain a bill in aid of removal proceedings thus decided to be void. When, therefore, the Circuit Court followed the opinion to its logical conclusion, and dismissed the bill, it did only what it was bound to do. *In obeying these*

directions it committed no error, and its decree cannot be reversed, even if it should appear that the court of appeals erred in holding that the condemnation proceedings did not amount to a suit within the meaning of the Removal Acts. The complainant had another remedy to test the correctness of that decision. It was open to it to ask the Circuit Court of Appeals to certify the question of jurisdiction to this court. If that motion had been overruled, the complainant had the further right to apply for a writ of certiorari. If the writ had been granted, the question of jurisdiction could have been tested here. If the writ of certiorari had been denied, the complainant would have remained bound by the decision of the Circuit Court of Appeals as the law of the case which could be changed neither by the Circuit Court directly, nor indirectly by the reversal of a decree properly entered in pursuance of the mandate of the appellate court. *Aspen Mining & Smelting Company v. Billings*, 150 U. S. 31, 37.

* * * Having failed successfully to prosecute these remedies, *the judgment of the Circuit Court of Appeals remained conclusive upon the parties and binding upon the Circuit Court, and every other court to which the case could by any possibility be taken.*

Union Trust Company v. Westhus, 228 U. S. 519, involved a direct review of a second judgment entered by a circuit court under a mandate of reversal

from the Circuit Court of Appeals, with directions to proceed further in accordance with the views expressed in its opinion. The writ of error from this court was upon the theory that a constitutional question was involved. This court, speaking through Mr. Chief Justice White, said (pp. 521, 522, 523):

The assignments of error involved a reexamination of all the issues including those which had been adversely passed on by the Circuit Court of Appeals. * * * Mindful of the proper consideration due to the Circuit Court of Appeals, and of our duty at all times to be scrupulous to keep within our jurisdiction, for the purpose of enabling us to apply the doctrine announced in the case of *Aspen Mining & Smelting Company v. Billings*, 150 U. S. 31, * * * we directed that the court below supply the deficiency, if any there was, in the record, by certifying all the proceedings had in the case.

* * * the insistence of the plaintiff in error is that every question is open, and in effect the argument seeks a review and reversal of the rulings previously made by the Circuit Court of Appeals. But by the distribution of power made by the Act of 1891, and embodied in the Judicial Code, no jurisdiction is conferred upon this court to review a judgment or decree of the Circuit Court of Appeals, otherwise than by proceedings addressed directly to that court in a cause which is susceptible of being reviewed.

Under these conditions the absence of jurisdiction to exercise the authority which we are now asked to exert would seem to be clear unless the principle be recognized that we have a right to do by indirection that which the statute gives us power only to do by direct action. * * *

But resort to original reasoning to establish the unsoundness of the proposition relied on is scarcely necessary, as that result will be made plainly manifest by applying principles established in the following cases:

Aspen Mining & Smelting Company v. Billings, 150 U. S. 31, 37; *Brown v. Alton Water Company*, 222 U. S. 325, and *Metropolitan Company v. Kaw Valley District*, 223 U. S. 519.

We have quoted thus exhaustively to show that this court has heretofore applied to facts nearly identical, the very doctrine for which we now contend, viz, that "the law of the case," when it went back to the District Court was the mandate and opinion of the Court of Appeals; which not only governed *that court*, in whatever steps it took to follow "the opinion to its logical conclusion" (*Metropolitan case, supra*), but for like reason must bar any consideration of the present writ of error by *this court*.

It remains to consider, in this connection, the significance of the element of finality in the judgment of the Circuit Court of Appeals, in cases like those just discussed.

In the *Metropolitan* case, the appellant attempted to distinguish the *Alton Water* case on the ground that the latter involved a *final* decree, while in the former the ruling of the Circuit Court of Appeals was made on a review of an interlocutory order, from which no writ of certiorari could issue. It refused to decide whether a writ of certiorari would issue to review a ruling of a Circuit Court of Appeals which was *not final* (leaving that question open until the decision in *United States v. Beatty*, 232 U. S. 463). Nor did it answer directly the question raised by the appellant whether the doctrine of the *Alton Water* case would be applied when the ruling of the Circuit Court of Appeals complained of was not reviewable directly by this court by *certiorari*. This court was relieved from the necessity of meeting that position because of its holding that the ruling in question in the *Metropolitan* case was final in effect, if not in form. The distinction between final and interlocutory decisions was not raised in the *Westhus* case, which followed the rule previously announced in the other three cases. It is submitted that under the broad application made in the *Westhus* case of the doctrine for which we are contending, the presence or absence of a *final* judgment is of no moment. This court, in maintaining what was called in the *Alton Water* case "the distribution of jurisdiction," will not assume through a process of indirection to establish an appellate jurisdiction which is not pro-

vided for in the Judicial Code. In the *Westhus* case this court said (p. 522):

But by the distribution of power made by the Act of 1891 and embodied in the Judicial Code, no jurisdiction is conferred upon this court to review a judgment or decree of the Circuit Court of Appeals *otherwise than by proceedings addressed directly to that court* in a cause which is susceptible of being reviewed. Under these conditions the absence of jurisdiction to exercise the authority which we are now asked to exert would seem to be clear unless the principle be recognized that we have a right to do by indirection that which the statute gives us power only to do by direct action.

The unequivocal refusal of this court to recognize any such principle will more fully appear under Point "III," *infra*.

II.

Acceptance of the plea of *nolo contendere* may not be argued or alleged by Shapiro, who, in the same cause, has taken the contrary position.

This court has denied the right of a party to a cause to take such an inconsistent position under conditions practically identical to the instant case. In *United States v. Beatty*, 232 U. S. 463, 468, it said:

Here the use sought to be made of the writ is not an admissible one. Whether the Seventh Amendment, preserving the right

of trial by jury, embraces a proceeding to condemn land for public use was one of the questions arising for decision in the Circuit Court of Appeals. In deciding it, the court but exercised an undoubted jurisdiction, *and this whether the decision was right or wrong. If wrong, it was a mere error, and the land owners, having invited it, will not be heard to complain.*

In *United States v. Jones*, 31 Fed. 725, 728, the facts were strikingly like those in the case at bar. After verdict and sentence, a plea in abatement had been upheld, the indictment dismissed, and the prisoner arraigned upon a new indictment. He pleaded former jeopardy. The Government demurred. The demurrer was sustained, on the broad ground that upon a second trial *secured on defendant's own motion*, former jeopardy can not be predicated upon the first proceedings. The court then says:

The observations of counsel, which have the effect of intimations that the decision of the circuit court declaring the indictment fatally defective was erroneous, will receive no attention at this time * * * the prisoner will not now be heard to criticise a judgment which he then insisted should be granted. * * * While counsel may go to great length in defense of one charged with crime, they can not be heard to blow hot and cold upon the same issue in the same record.

Shapiro's omission of part of the record in this case was undoubtedly to enable him to deny that he

was blowing hot and cold upon the same issue, and to argue that his hot breaths were all blown into the record before the Circuit Court of Appeals, and that only the frigid blasts were incorporated in the record to this court.

Bigelow, in his treatise on Estoppel, says, at page 783 (6th ed.) :

It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose. * * *

The principle under consideration will apply to another suit than the one in which the action was taken, where the second suit grows out of the judgment of the first. It is laid down that a defendant who obtains judgment upon an allegation that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth (p. 789).

Although the latter paragraph deals with an independent subsequent suit, the principle applies with even greater force to proceedings in the same case, had under a mandate of an appellate court. This court has stated the principle in the following language, in *Davis v. Wakelee*, 156 U. S. 680, 689, and 691 :

It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds

in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. * * * He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position.

III.

This court has no jurisdiction to question or interpret, on a writ of error sued out directly to a District Court, the action of that court in giving effect to a decision of a Circuit Court of Appeals.

The present argument carries the principle announced in Point "I," *supra*, a step further, viz. that the question whether the *action* of the District Court was *in accordance with* the mandate and opinion of the Circuit Court of Appeals, is not a question open to this court. Every ruling and proceeding in the District Court upon the second trial was pursuant to that mandate; and any review of those rulings and proceedings must involve an interpretation of, and so constitute a review of the mandate itself. Or, if it be said that we are assuming, in the foregoing sentence, our conclusion, it is equally true that *even to attempt* to ascertain

whether the rulings were pursuant to the mandate, is to read and interpret the mandate itself.

We have seen that this court will not undertake "to do by indirection that which the statute gives us power only to do by direct action" (*Union Trust Co. v. Westhus*, 228 U. S. 519, 524; *Brown v. Allon Water Co.*, 222 U. S. 325, 331); and that it will not pass upon the validity of a former mandate of a Circuit Court of Appeals, upon a writ of error issued directly to a District Court. If an out and out construction of a mandate involves indirection, *a fortiori* does a construction thereof by means of a review of proceedings had in accordance therewith. The proceedings must be interpreted in the light of the terms of the mandate, thus simply adding another step in the process of indirection.

To determine whether the District Court erred in carrying out the mandate, we must interpret and construe the mandate itself. In *United States v. Patten*, 226 U. S. 525—the "*Colton Corner*" case—the Government sought review, under the "Criminal Appeals Act," of a decision of the Circuit Court to the effect that although the indictment charged a corner, it was not such a corner as was condemned as criminal by the Anti-Trust Act. This court, obliged to consider whether that decision was based upon an erroneous construction of the statute, said:

At the outset we are confronted with the contention that the decision is not based upon a construction of the statute. But to this we

cannot assent. The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it. (535.)

A paraphrase presents a striking application. It seems a solecism, indeed, to say that a determination of whether or not certain proceedings were had *according to a mandate*, is not based upon a construction of it.

On this precise ground this court refused to consider the appeal in the *Alton Water Co.* case, *supra*, saying:

As it follows that we have no jurisdiction to review by direct appeal *the action of the Circuit Court in giving effect to the decision of the Circuit Court of Appeals*, it results that the appeal must be dismissed (p. 334).

This is no mere holding that the rulings of the Circuit Court of Appeals are not reviewable indirectly upon a writ of error addressed to the District Court; but rather *that the action of* the latter court in giving effect to those rulings is not thus subject to review here.

A statement of the undeniable logic of such an application of the doctrine appears in the latter

part of the opinion of this court in the *Westhus* case, *supra*. At page 523 it is said:

It is insisted, however, that in both the Aspen and the Alton cases, the questions which it was sought to review by direct appeal, after the decision of the Circuit Court of Appeals, had been, either expressly or by necessary implication, passed upon by that court and therefore were expressly foreclosed, while here such is not the case, since the constitutional question was not in the case when it went to the Circuit Court of Appeals, but only made its appearance by an amendment to the pleadings after the decision of that court. *Granting the premise upon which the argument rests, the deduction is unfounded.* The ruling in both the Aspen and Alton cases rested upon the plain ground of the duty of this court not to exert a power not conferred, of the impossibility of proceeding upon the theory that error could be said to have been committed by the trial court because it had applied the decision of the Circuit Court of Appeals or of maintaining the right to the direct appeal which was relied upon in those cases consistently with the power of the Circuit Court of Appeals, *not only to decide questions within its jurisdiction, but moreover to determine whether, when in a particular case it had decided such questions and remanded the case in which they had been decided to a trial court for further proceedings, that court had in such further proceedings given due effect to its decision.* * * *

* * * the source of the error * * *

consists in pursuing a mistaken avenue of approach to this court; that is, of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the Circuit Court of Appeals, *the way to that court should have been pursued even if it was proposed to ultimately bring the case here.* The error comes from attempting, after the case has been taken to the Circuit Court of Appeals and been there decided, to resort to proceedings for review which under the statute are applicable only in case no such action by the Circuit Court of Appeals had been taken.

This court conceded in the above case that it was asked to determine an original question, first introduced in proceedings had below after the filing of the mandate. Doubtless it will be urged here that the constitutional question of jeopardy was not in the case when it was in the Circuit Court of Appeals. In the *Westhus* case, *supra*, the court held this feature was immaterial; and said that the Circuit Court of Appeals might not only decide law questions and remand for compliance, *but must also determine whether the lower court had observed its mandate.* So we may concede here that the whole question of former jeopardy is original to this writ of error. Nevertheless, in the subsequent proceedings before the District Court, the question arose—what should be done to give effect to the mandate; and the action of the District

Court in that regard should have been reviewed in the court that issued the mandate.

The principle is clear; and practical considerations shown in the present case compel refusal to recognize the theory which the plaintiff in error would invoke. A direct review of a lower court's decision presents precise issues. But a review of a lower court's action in carrying into effect an intermediate appellate court's decision is quite different. It may involve not only determination of specific issues so raised, but also speculation as to the possible attitude of the intermediate court, as to the action below, resulting from its own prior decision. The case at bar affords an apt illustration. In its *per curiam* decision the Court of Appeals adopted as a part thereof its opinion of the same date in *Tucker v. United States*, 196 Fed. 260; p. 21, Suggestion of Diminution, Appendix "C." In the *Tucker* case, even after several of its counts had been *nol prossed*, there yet remained a count charging an offense punishable by fine alone. Holding that that count furnished ground for entertaining the plea of *nolo contendere*, the court passed to a consideration of the acceptance or nonacceptance of the plea. In the *Shapiro* case, however, no count that was punishable by fine alone remained. This distinction between the two cases was overlooked. Plaintiff in error sought advantage of the court's confusion on this point, when he said (his brief,

filed in support of his petition to release the mandate, p. 179, Suggestion of Diminution, Appendix "J"):

If the facts now known had appeared in the record, this court would have merely had to affirm the judgment as to the fines and reverse as to the imprisonment, in order to conclude these cases. It is recognized in the opinion of the court that if the record had shown that pleas of *nolo contendere* had been entered and sentence imposed upon them that the proceedings would have been free from error. * * * When it is now known that the pleas were in fact accepted and that sentence was imposed thereupon the question is no longer one of difficulty.

But what of the case of Shapiro, where there were no "judgments as to the fines" to be affirmed? Under the theory that the plea of *nolo contendere* had been accepted, this court must speculate as to the probable mandate of the Circuit Court of Appeals, and the probable action of the District Court thereunder. Plaintiff in error even argues that, had the Court of Appeals known the facts, as he now asserts them it would have acquitted him entirely; that the *nol prossing* of the fine counts constituted an abandonment of the whole indictment; and that the Circuit Court of Appeals would so have held could it have applied its views correctly to the peculiar facts of his case. This is merely to say that had it done a thorough

job it would have set him free rather than have sent him back for further proceedings. Why, then, did not Shapiro sue out the present writ from that court rather than this, and ask it to amplify its judgment, or review the action of the District Court in effecting the mandate? He realized that that court was *alone* qualified to take up the case at that point, when he petitioned it to release its mandate. He came to this court because of the *denial* of that *petition*. Surely if ever a plaintiff did so, Shapiro here pursued "a mistaken avenue of approach to this court." (*Westhus* case, *supra*.)

It would be impossible even if not undesirable, for this court to speculate as to what the Circuit Court of Appeals would have done, had it known the facts to be otherwise, and what it would have had the District Court do in such event, to carry its mandate into effect.

For the reasons stated, it is respectfully submitted that the writ of error should be dismissed.

JOHN W. DAVIS,

Solicitor General.

WM. WALLACE, JR.,

Assistant Attorney General.

OCTOBER, 1914.



Office Supreme Court, U. S.

FILED

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JAMES D. MAHER

CLERK

No. 93

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

DAVID SHAPIRO,

Plaintiff in Error,

vs.

UNITED STATES,

Defendant in Error.

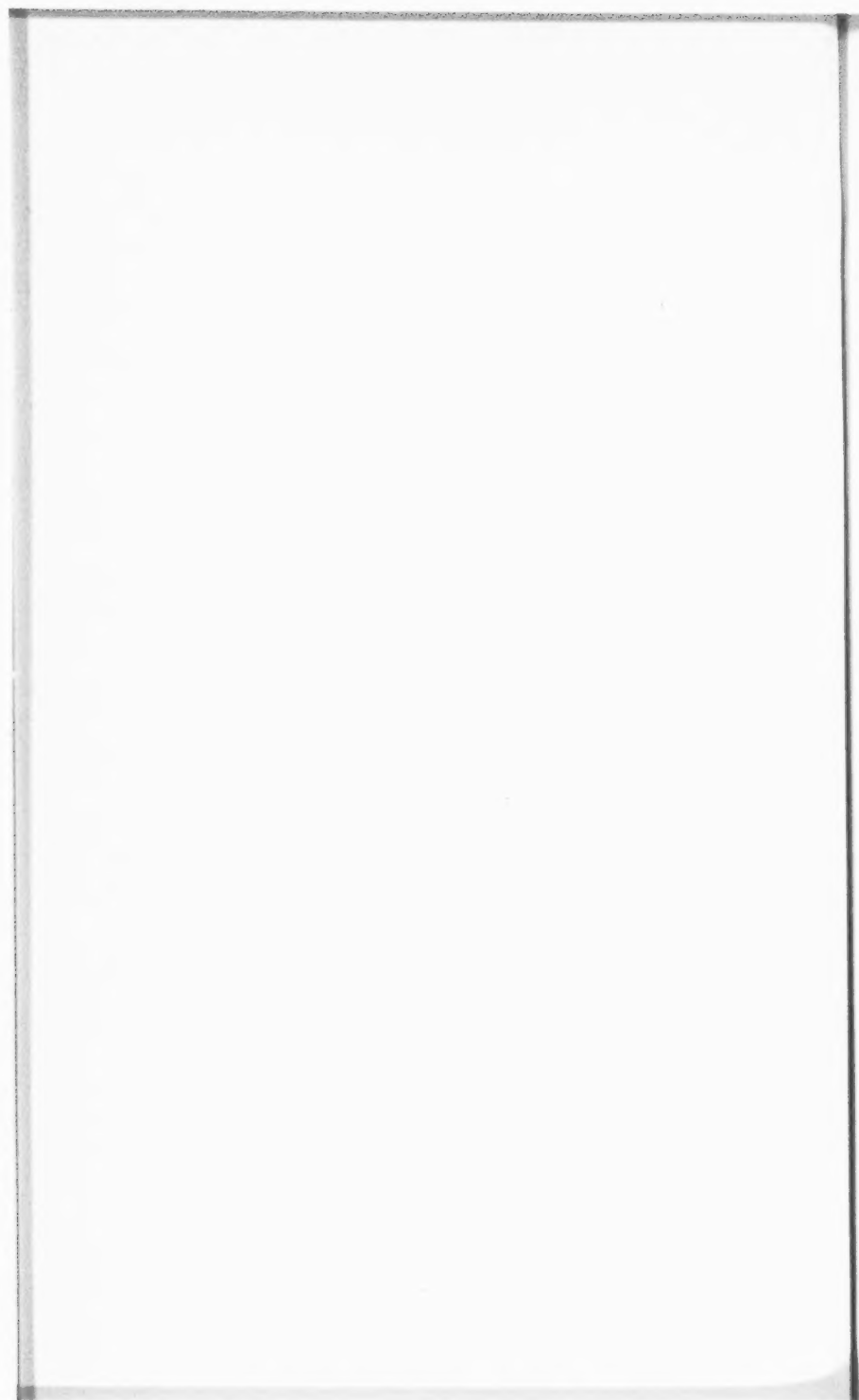
} In Error to the Dis-
trict Court of the
United States, North-
ern District of Illi-
nois.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Geo. Hornstein Co., Printer, Chicago.



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POINTS AND AUTHORITIES.

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

DAVID SHAPIRO, <i>Plaintiff in Error.</i> vs. UNITED STATES, <i>Defendant in Error.</i>	}	In Error to the District Court of the United States, Northern District of Illinois.
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BRIEF IN OPPOSITION TO MOTION TO DISMISS.

May it please the Court:

This cause is number 93 on the docket of this term. Briefs on the merits were filed by plaintiff in error long before notice of the present motion was served. The Government, since the service of the notice of this motion, served on us its brief on the merits. The case will be reached for oral argument probably within a week or two after this motion is presented to the court. In view of the novelty and importance of the questions presented by our main brief and the extraordinary situation appearing in the record, we believe that the court should reserve decision upon this motion until the whole case has been argued.

The Solicitor General moves to dismiss the writ of error herein on grounds which, it appears to us, clearly misconceive the contentions of plaintiff in error in his main brief and the state of the record itself.

We are *not* asking this court to review directly or indirectly the action of the Circuit Court of Ap-

peals upon the former writ of error. The record as it is now before this court on this writ of error, and as it was made in the District Court, is entirely different from the one that was before the United States Circuit Court of Appeals on the first writ of error; the questions passed upon by the District Court after remandment and sought to be reviewed here, were not before the Circuit Court of Appeals and in the nature of things *could not have been*, because they all *arose subsequent* to the mandate. The mandate gave no *specific* directions and the whole case was left open.

This is a criminal case. We come to this court upon the contention that plaintiff in error has been twice in jeopardy in violation of the 5th amendment to the Constitution of the United States. Under the ruling of *Ex Parte Nielsen*, 131 U. S., 176, and subsequent cases approving it, a judgment placing a man twice in jeopardy is simply void for want of jurisdiction, and not merely erroneous, and can be reviewed collaterally by this court by *habeas corpus*. There certainly can be no ground of objection to the method pursued here to have the judgment reviewed upon a direct writ of error. This case is therefore distinguishable from the civil cases relied upon by the Government, both on the facts and on principle. This is a case where the liberty of a citizen is involved. The questions presented by the three separate pleas of former jeopardy and compromise arose subsequent to the mandate and involve *only* the application and construction of the Constitution of the United States, and, accordingly, the jurisdiction of this court is *exclusive*.

Huguley Mfg. Co. v. Galetton Mills, 184 U. S., 290.

This case, therefore, is properly here and could not upon these pleas have gone to the Circuit Court of Appeals.

The facts upon which the contentions of plaintiff in error are based are admitted by the demurrers of the Government to our pleas of former jeopardy and compromise. (Trans., 33, 36, 37.) Under the authority of *Ex Parte Nielsen, supra*, the record made by these pleas is *sufficient*. The Government, however, is seeking to take issue upon the pleas in this court; and this is the purpose for which the additional record was filed. It is true, however, the additional record was allowed to be filed by the court *without prejudice*.

STATEMENT.

The statement made by the Solicitor General is exceedingly vague and insufficient. For this reason we are obliged to present here a brief statement of the case as shown by the record.

The plaintiff in error, David Shapiro, referred to in this statement as defendant, was indicted in the District Court for the Northern District of Illinois, on June 21, 1910, charged with the violation of the Internal Revenue Laws of the United States. The indictment contained thirteen (13) counts. (Trans., 2.) The first four counts charged a violation of Section 3286 of the Revised Statutes; Counts 5, 6, 7 and 8, a violation of Section 3317; Count 9, a violation of Section 3318; Count 11, a violation of Section 3326, and Count 12, a violation of Section 3324, all felonies.

Count 10 charged a violation of the Act of July 16, 1892, Chapter 196 (27 Stat. L., 200), which pro-

vides no penalty for its violation, the penalty therefor being governed by Section 3456 of the Revised Statutes *imposing a fine only*. The numbers of the various sections of the statutes upon which the prosecution is based are endorsed upon the back of the indictment, under the signature of the foreman of the grand jury. (Trans., 7.) Mention is made of this count because the Government contends that there was no count in the indictment charging a misdemeanor and punishable by a fine only.

Count 13 charges a violation of Section 3455 of the Revised Statutes, which is punishable by fine only, if committed without intent to defraud the revenue, and by fine and imprisonment if committed with such intent.

Defendant, on June 24, 1910, pleaded *not guilty* to said indictment. (Trans., 7.)

On January 3, 1911, he appeared and in the presence of the United States Attorney "*by leave of court first had and obtained*, said defendant withdraws his plea of not guilty heretofore entered herein, and being now arraigned upon the indictment filed herein against him, pleads *nolo contendere* thereto." (Trans., 9.)

On January 20, 1911, *after* the acceptance of the plea of *nolo contendere*, the United States Attorney, by leave of court entered a *nolle prosequi*, as to all counts except the fourth, ninth and twelfth, and it was thereupon ordered that the defendant be discharged from further prosecution under Counts 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13, leaving in the record only three counts, each of which charged a felony. (Trans., 10.)

The record further recites that afterwards on the same day, "This cause coming on to be heard *on de-*

defendant's plea of nolo contendere heretofore entered herein, come the parties by their attorneys and the defendant in his own proper person, and the hearing proceeds, and the court having heard the evidence, * * * takes the cause under advisement." (Trans., 10.)

On January 23, 1911, judgment was entered by Judge Landis finding the defendant guilty and sentencing him to imprisonment in the penitentiary at Fort Leavenworth, Kansas, for two (2) years and to pay a fine of ten thousand dollars. (Trans., 11.)

Thereupon a writ of error was sued out by the plaintiff in error from the Circuit Court of Appeals to reverse said judgment. There was no contention in that court in this case that the *plea of nolo contendere had not been accepted*. Had the Government filed the complete brief of counsel of plaintiff in error instead of the mere assignment of errors, this court would have found that in that brief it was contended that the plea of *nolo contendere* was not acted upon, that is to say, that the court in pronouncing a penitentiary sentence and making a finding of guilty acted in derogation of the plea. The Court of Appeals held that *nolo contendere* was a valid plea pleadable in the Federal courts, but that no imprisonment could be imposed under it. No estoppel was pleaded by the Government in the court below; and the question of estoppel comes up for the first time in this court. The Government for the first time here is seeking to take issue with the defendant on his pleas of former jeopardy, and this was the purpose of the additional partial record filed in this cause, which does not show the briefs of coun-

sel in the case. As appears from the opinion filed by the Circuit Court of Appeals, plaintiff in error in that writ of error contended, first, that the plea "was not entertainable under the assumed charge of felony *nor under any charge requiring imprisonment* and thus constitutes no answer to the indictment so that the conviction without jury trial was unauthorized; or if entertainable, that the judgment *is in derogation* of said plea and was not authorized." (Opinion of C. C. A., Suggestion of Diminution, page 27.) It was also contended in that brief that no imprisonment can be had upon a plea of *nolo contendere* and that the sentence of imprisonment was excessive based upon such plea.

The Solicitor General's brief, page 3, assumes to quote from the opinion the contention of the plaintiff in error that the plea had not been accepted, whereas, as will appear from a reference to the opinion itself (Suggestion of Diminution, p. 39), what is quoted by the Solicitor General is merely the reason given by the Circuit Court of Appeals for sustaining the contention of plaintiff in error, which was "in substance that both proceedings and judgment are in derogation of the plea," as appears from the same sentence upon which the Solicitor General relies. Neither the assignments of error nor the brief of plaintiff in error in that court (Suggestion of Diminution, 16, 17) contains the contention which the Solicitor General assumes we urged in the Circuit Court of Appeals. Had the briefs of counsel been also filed the incorrectness of the Government's statement would at once be patent. In the brief of the U. S. filed in the Court of Appeals

at page 2 the Government states the position of the plaintiff in error in that court as follows: "And the only point urged is that the court acted without jurisdiction in imposing a sentence of imprisonment upon the plea of *nolo contendere*. It is admitted that the judgment is valid so far as the fine is concerned." Since the Government brought up a part of the Court of Appeals proceedings, it should have brought up also its own brief as well as the brief of the plaintiff in error.

The Court of Appeals held that the plea of *nolo contendere* was in the nature of a compromise; that it could be taken as to the misdemeanor counts and operated as a dismissal as to the felony counts; that under the indictment in this case it was proper to take the plea of *nolo contendere*; that under such plea defendant could not be sentenced to imprisonment—the maximum penalty permissible under that plea being a fine; but inasmuch as it did not appear affirmatively from the record that the plea had been accepted, *and as the evidence heard was not in the record, no presumption could be indulged that the evidence was heard merely for the purpose of fixing the punishment* (Note: This evidence is now before this court, brought here by the Government (Suggestion of Diminution, p. 57)); but that the proceedings subsequent to the entering of the plea were all inconsistent therewith and, therefore, the judgment was erroneous. The cause was thereupon remanded with directions either "to accept or refuse acceptance of the *nolo contendere* plea as tendered and proceed further in conformity with law."

Thereupon, upon remanding, the District Attorney, in violation of his previous consent to the entry of the plea of *nolo contendere*, moved the court to reject the plea of *nolo contendere*, and the court, *without hearing any evidence*, against the objection and exception of the defendant, entered an order rejecting said plea and directing plaintiff in error to plead. Plaintiff in error refused to plead on the ground that he already had pleaded *nolo contendere* and thereupon the court directed the Clerk to enter a plea of not guilty for him. (See Bill of Exceptions, Trans., 16; Rec., 11.) Thereafter, plaintiff in error, by leave of court (Trans., 17), filed three verified special pleas, the first of which alleged that the plea of *nolo contendere* had been entered by *leave* of court and with the consent of the United States Attorney and "that said plea was then and there duly accepted by the District Court"; that the cause came on for hearing upon said plea of *nolo contendere* and later came on for sentence upon said plea and defendant was sentenced to the penitentiary as above set forth; that "while it is true that some ambiguity exists in the record as written up by the Clerk * * * whether the plea of *nolo contendere*, as pleaded by this defendant, was accepted by the court, *nevertheless, in truth and in fact, the District Court did accept the plea of nolo contendere*, and, acting under and upon said plea of *nolo contendere*, heard evidence solely for the purpose of fixing the punishment to be imposed upon him, this defendant, *and any recital in the record to the contrary or ambiguously stated is merely a misprision of the Clerk of the court for which this de-*

fendant cannot in any way be held responsible."
(Trans., 19.)

By reason of the above facts the plaintiff in error claimed in said plea the benefit of the Fifth Amendment to the Constitution of the United States. This is the only plea to which the argument of the Solicitor General on this motion is at all applicable. He does not argue in his motion to dismiss the second and third pleas of the defendant.

The second special plea alleged that the defendant had compromised the civil and criminal liability with the Commissioner of Internal Revenue and therefore could not be tried under the indictment. (Trans., 21.) It has been held in *U. S. v. Chouteau*, 102 U. S., 603, that a plea of compromise has the same effect as a plea of former jeopardy, and that they are substantially the same.

The third special plea alleged that while the writ of error was pending in the Circuit Court of Appeals, the original order of supersedeas was modified to authorize the United States to enforce the collection of the judgment so far as the fine was concerned; that thereafter a certain draft for \$5,000 was seized by the officials of the United States in partial satisfaction of said fine, and that, therefore, said original judgment had been in part satisfied and plaintiff in error could not again be tried under this same indictment, having been once in jeopardy. (Trans., 27.) Defendant in said plea invokes the protection of the Fifth Amendment to the Constitution of the United States.

General demurrers were interposed to each of said special pleas, which demurrers were sustained

by the District Court, and exception was duly taken. (See Bill of Exceptions, Trans., 35.) Over his objection the defendant was placed upon trial before a jury (Trans., 45), found guilty and sentenced to imprisonment for two years and to pay a fine of \$5,000, to reverse which judgment the writ of error herein was sued out.

The following additional facts also appear in the Suggestion of Diminution of the record filed by the Government, which was allowed to be filed without prejudice. After the mandate of the Circuit Court of Appeals had been filed in the District Court, plaintiff in error filed a motion therein to correct the record so that the same would show clearly what was the fact, namely, that the plea of *nolo contendere* had been accepted. This motion was filed at the time the first special plea was filed. Before the motion to correct the record was heard in the District Court, the District Attorney demurred to the plea of former jeopardy, thereby admitting that the record was as alleged in said plea, and making it unnecessary to proceed with said motion (*Ex parte Nielsen*, 131 U. S., 176), and therefore the motion to correct the error was not pressed and the record shows that no order was entered thereon. At the time of filing the first plea of former jeopardy, a petition was filed in the Circuit Court of Appeals for the release of the mandate to relieve the District Court of any embarrassment in hearing of the motion to correct the record, which motion the Court of Appeals denied without any opinion. As there were no specific directions in the mandate of the Court of Appeals, a release of mandate was wholly

unnecessary and that may have been the reason for denying this motion. Among the papers filed with the suggestions for diminution of the record is the affidavit of Stephen A. Day (Suggestion of Diminution, 49). Mr. Day was one of the counsel in the court below, for plaintiff in error. He interviewed Mr. Buell, the Deputy Clerk of the District Court, who wrote the record, and the latter informed him that when the plea of not guilty was withdrawn and *nolo contendere* entered, he, the Clerk, thought that it was accepted and that it was not necessary to show anything further than that one plea was withdrawn and the other substituted in order to show such acceptance. That the finding of guilty in the judgment was also the result of the error of the Clerk, and was not the result of any direction by the court, but that there was absolutely no question but that plaintiff in error was sentenced on his plea of *nolo contendere*. The original minutes of the Clerk are attached to this affidavit showing that Shapiro was sentenced on the plea of *nolo contendere*. (Suggestion of Diminution, 51.) There also appears in said suggestions the affidavit of Willard M. McEwen, who represented plaintiff in error in the District Court, reciting that with the consent of the District Attorney, he asked leave of court to withdraw the plea of not guilty and to substitute the plea of *nolo contendere*; that thereupon in open court, the District Attorney saying nothing, defendant withdrew his plea of not guilty and entered a plea of *nolo contendere*, "which plea was then and there accepted by the said Judge who stated in open court, 'Let the plea of not guilty be withdrawn and

a plea of *nolo contendere* entered';" that the cause was set down for hearing solely for the purpose of fixing the punishment and that evidence was heard for that purpose and none other. (Suggestion of Diminution, 55.)

It also appears from these suggestions that thereafter and before the original sentence by Judge Landis, evidence was heard by the court without a jury, plaintiff in error admitting (Suggestion of Diminution, 59) that he had been conducting an illicit distillery and he *himself testifying* (Suggestion of Diminution, 111) at great length as to all the circumstances of the conduct of said business.

After the Government has thus learned all the facts upon a plea of mercy from the defendant, it proceeded, after finding that it could not imprison the defendant upon his plea, to try him again. Is that fair? *Ignorantia juris non excusat. Ignorantia excusatur, non juris sed facti.*

I.

The Circuit Court of Appeals did not pass and could not have passed upon the second and third pleas. The opinion is therefore not the law of the case as to these pleas, nor are we seeking a review of its opinion as to those pleas. As to those pleas there is no opinion and no mandate.

The Solicitor General apparently has overlooked the fact that there are *three* pleas of former jeopardy in the record, not one. The entire contention on the motion to dismiss is that plaintiff in error is bound by the opinion of the Circuit Court of Appeals as to the plea of *nolo contendere* and that the

action of the District Court based upon that decision cannot be reviewed. This phase of the matter will have attention later. But, at the outset, we beg to call the court's attention to the fact that there were two pleas of former jeopardy which the Circuit Court of Appeals *could not possibly have passed upon*, the facts alleged in the plea not being at all in the record on the first writ of error, and as to one of them the facts are alleged to have occurred *after the judgment of Judge Landis*.

The plaintiff in error filed a plea of former jeopardy, alleging (Trans., 21) that he had tendered a certain amount of money to the Commissioner of Internal Revenue in compromise of all civil and criminal liability growing out of the charge alleged in the indictment; that the Commissioner accepted said amount and deposited it in the treasury of the United States.

In the case of *United States v. Chouteau*, 102 U. S., 603, which was an action upon a distiller's bond to recover for breaches of some of the revenue statutes, defendants pleaded that indictments had been returned against the principals for the same violations; that thereafter the Commissioner of Internal Revenue accepted a certain amount in full satisfaction, compromise and settlement of the indictment and prosecution which were thereupon dismissed and abandoned, and that, therefore, suit on the bond was barred. The court says as to the effect of such compromise:

"Under the authority of an Act of Congress a compromise with the Government was effected, by which a specific sum was paid by him,

and received by the Government, 'in full satisfaction, compromise and settlement of said indictments and prosecutions,' which were accordingly dismissed and abandoned. That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offenses charged and any further punishment for them.

"The compromise pleaded must operate for the protection of the distiller against subsequent proceedings *as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense.* To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the Government delusive and useless.

"Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The Government through its appropriate officers has indicated, under the authority of an Act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the Government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty."

See, also:

Wells v. Nickles, 104 U. S., 444.

The plaintiff in error also filed a third plea alleging that *after the writ of error was sued out* of the Circuit Court of Appeals, the supersedeas was modified to permit the Government to proceed with the

collection of the fine imposed and that thereafter there came into the hands of the Government the sum of \$5,000 belonging to the plaintiff in error which was held and retained by the officials in partial satisfaction of said fine. (Trans., 23 to 27.) Whatever may be the situation as to the other pleas, clearly this plea alleging facts arising after the judgment could not have been passed upon by the Circuit Court of Appeals and the opinion and judgment of that court could in no sense bar the District Court upon remand, from proceeding to consider said plea upon its merits. *These pleas do not in any respect depend upon the acceptance or rejection of the plea of nolo contendere*, but are good whether or not such plea was accepted. It cannot be said that we are seeking to review, directly or indirectly, an opinion as to these pleas—when there was no opinion and could have been no opinion. This plea is discussed in the main brief on the merits filed by us for plaintiff in error at pp. 37, *et seq.*

It was the duty of the District Court to decide and it did decide the questions raised by the pleas and which were all left open by the mandate of the Court of Appeals.

Hinkley v. Morton, 103 U. S., 764.

In *Roberts v. Cooper*, 20 How., 467, 481, the court said, after speaking at length on what would not be gone into on second appeal:

“We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions *which were peculiar to the second trial.*”

II.

The mere entry of the plea of *nolo contendere*, by leave of court, regardless of its formal acceptance, placed the defendant in jeopardy because the defendant was liable to an immediate sentence, and he was so sentenced. Therefore it was not within the power of the trial court against the defendant's objection to set aside said plea and retry the case before a jury, and the action of the court in doing so was in direct violation of the Fifth Amendment to the Constitution of the United States.

It is not necessary, as contended by the Government, in order to claim former jeopardy, that there should have been a judgment entered upon the plea.

Kepner v. U. S., 195 U. S., 101.

People v. Goldstein, 32 Cal., 432.

Boswell v. State, 111 Ind., 47.

This point is argued in the main brief of plaintiff in error at p. 13 *et seq.*

III.

This court clearly has jurisdiction to review proceedings subsequent to the mandate and even matters before the Court of Appeals, where the record there was the result of a clerical error.

It should be apparent from the statements of the case, that plaintiff in error is not seeking a review of the decision of the Circuit Court of Appeals even on the sole plea which the argument notices. We, of course, admit that it is the general rule that

where a cause is reversed *with specific directions* as to the entry of a judgment by the court below, no appeal will lie to review the action of the court in complying with that specific mandate where the record before the court is the same as it was before the Court of Appeals. To this, of course, there are exceptions.

There is no conflict of authority on the right to review proceedings *subsequent to the mandate*. (*Hinkley v. Morton*, 103 U. S., 765.) Where the mandate settles *all* questions, and judgment is entered thereon, there is, of course, no appeal. The question of former jeopardy could not have arisen in the Circuit Court of Appeals on the first writ of error. Then he had been tried only once. He could not interpose his plea of double jeopardy until it was sought to again place him on trial for the same offense.

Admitting, for the sake of argument, that the Circuit Court of Appeals did pass upon the question of the acceptance of the plea, there would still remain upon the present plea of former jeopardy the question whether the defendant was not in jeopardy **BY THE WITHDRAWAL OF HIS PLEA OF NOT GUILTY AND HIS PLEADING OF NOLO CONTENDERE WHICH WAS ALL DONE BY LEAVE OF COURT**, because under the plea of nolo contendere the defendant was **IN DANGER OF BEING IMMEDIATELY SENTENCED**. This phase of the case we discussed amply in our main brief on the merits at p. 13 et seq.

Moreover, this judgment was clearly not conclusive upon the District Court if entered upon an er-

roneous record, made through the *misprision* of the Clerk. This is a clear exception to the rule relied upon by the Solicitor General.

Marks v. Brown, 136 Fed., 168.

Metcalf v. Watertown, 69 C. C. A., 80; 68 Fed., 861.

In *State v. Parish*, 43 Wis., 395, the court said:

" * * * To the proposition that the order arresting judgment for the alleged insufficiency of the record is conclusive that the record is fatally defective. some cases are cited which seem so to hold. But the contrary has been held in other cases and we think the latter are supported by the better reasons. *It seems to us inevitable that the court which is called upon to decide the sufficiency of such a plea, must determine for itself whether the jeopardy has existed.* But to do so it must necessarily pass upon the sufficiency of the record on which the plea is founded independently of the rulings of the court in which the former trial was had."

In that case (*State v. Parish*) the defendants were arraigned and pleaded not guilty to a charge of burglary. On application of defendants the venue was changed to another county and they were found guilty. In transferring the record, however, the Clerk *omitted* to send that portion which showed the arraignment and plea of defendants. The omission was not discovered until after the verdict.

Defendants moved to arrest judgment and one of the reasons assigned was that they had not been arraigned or pleaded to the information.

The court held the information good, but arrested judgment for want of arraignment and pleas and

remanded defendant to answer a new information for same offense.

On this second information a plea of jeopardy was held good, and speaking of that phase of the case with reference to the legal effect of the failure of the proper officer of one county to transmit the whole record to another county, the court said:

“What is the legal effect of the failure of the proper officer in Crawford County to transmit the whole record to the Circuit Court of Vernon County? How does such failure affect the question of jeopardy? Had the whole record been so transmitted, it could not be doubted that the trial and conviction of the defendants upon the first information was a putting in jeopardy of the defendants, within the constitutional signification of that term. Is the jeopardy removed because a public officer (innocently no doubt) failed to do his duty? We think not. The question of jeopardy must be determined from the whole record, whether the record be in the trial court or in the court in which the information was first filed, or whether a portion of it is in one court and the residue in the other. The record is an entirety, and no unauthorized severance of it can operate to deprive the defendants of any right which, otherwise, they would have.”

So here, it appears clearly that the record before the Circuit Court of Appeals was defective, which was due solely to the misprision of the Clerk of the District Court and not in any degree to any negligence on the part of the plaintiff in error. The Circuit Court of Appeals passed upon the record as it then stood and entered a judgment of reversal containing no specific direction. This judgment was

one from which plaintiff in error could not appeal. He was not injured by the judgment and could not be, because his status under the judgment was left uncertain and jeopardy could not attach until he was again placed on trial before the District Court. There was no direction to the District Court to place the defendant on trial, but merely a general direction to accept or refuse acceptance of the plea and to proceed further in conformity with law. When the matter again came before the District Court he, knowing the fact that the plea of *nolo contendere* had been accepted, the mandate requiring him "to proceed in conformity with law" plainly demanded that he should enter a formal acceptance on the record and enter a judgment in conformity with such plea. Had he done so there could have been no appeal from that judgment. That the District Court had ample authority after the mandate was filed, to correct the record or proceed in accordance with the true record seems clear from a consideration of the following cases:

Baltimore Bldg. Ass'n v. Alderson, 99 Fed., 489, 492.

Ex Parte Marks, 136 Fed., 168.

Bank v. Moss, 6 How., 31, 38.

It must not be forgotten that the pleas *do not contradict the record* before the Court of Appeals, but merely *supply an omission* due to error of the Clerk.

It cannot be said that we are seeking a review of any action of the Circuit Court of Appeals on this plea or upon any fact upon which the plea is based.

Neither the plea nor the facts upon which it was based *were before that court.*

Where the former decision relates to a question of *fact*, it is plainly the law that it is not binding upon a second appeal where the record discloses a different state of facts.

Davidson v. Mayhew, 169 Mo., 258.

Klauber v. San Diego, 98 Cal., 105.

Thompson v. Michigan Life Ins. Co., 105 N. E. (Ind.), 780.

In *Nieto v. Carpenter*, 21 Cal., 455, where the cause was reversed with direction to enter judgment for defendant, it was held on a subsequent appeal to the same court that the former opinion was not binding, *being based upon an incorrect translation of a document in evidence.* The court say:

"We admit that a previous ruling of the Appellate Court upon a point directly made is, as to all subsequent proceedings, a final adjudication from the consequences of which the court cannot depart, nor the parties relieve themselves. * * * But, such ruling, if relating to a matter of fact, can only be invoked where the fact reappears under the same circumstances in which it was originally presented."

In *Harrold v. Commonwealth*, 10 Ky. L. Rep., 70, it appeared from the record in a first appeal that the indictment omitted an essential element of the offense with which appellant was charged, and thereupon the cause was reversed with directions for further procedure consistent with the opinion. Upon the return of the case appellant was re-tried upon the same indictment, was found guilty by a jury,

and again appealed to the Court of Appeals. The court say:

“The principal ground relied on for reversal is that inasmuch as this court in the former opinion decided the indictment, as it was by *mistake* then made to appear, was defective, we should adhere to that decision, though the indictment, as it in the present transcript truly and correctly appears to us, is entirely free from the supposed defect. The effect of sustaining such a proposition would be to place it in the power of a ministerial officer to defeat justice, not merely for the time being, but permanently and effectually. The result of reversing the former judgment has been a new and distinct trial, and the only question proper for us to now consider is whether there has been any error of law committed, to the prejudice of the substantial rights of appellant.”

In *Trinity County v. McKenna*, 25 Cal., 117, after an order was entered directing the lower court to dissolve an injunction, a motion was made for a modification of the opinion on the ground that the court misapprehended the contents of a certain document referred to in the record. The motion was refused, the court saying (page 121):

“In so far as the misapprehension of the contents of the committee’s report is concerned, the document, as such, was not in the transcript, and we were, therefore, justified in assuming that it had no contents, *aliunde* the contents set out in the proceedings. Any case coming here hereafter showing that the report comprehended topics other than those to which the present record confines it, will be to that extent, different from the present, and of course, one to which the opinion in this case cannot be considered as having any just application.”

And it was held in the case of *The E. A. Packer*, 58 Fed., 251, where the court expresses its opinion upon an incomplete case such opinion is not conclusive upon a second appeal. And where a party, after remandment, files a substituted pleading and on the trial it appears that the facts were materially different from those presented by the prior plea, the decision of the Appellate Court is not conclusive.

Scott v. Wilson (Iowa), 139 N. W., 1043.

And in *Milwaukee, etc., R. R. Co. v. Souther*, 2 Wall., 510, where it is held that although the court below is bound to follow the instructions given in a mandate, yet where a mandate has been framed on a supposition subsequently proven to be untrue, the mandate must not be so followed as to work manifest injustice.

In *Story v. Livingston*, 13 Pet., 359, at 373, it is said:

“The mandate is to be interpreted according to the subject-matter to which it has been applied and not in a manner to cause injustice.”

In *Packard v. Kinzie Co.*, 105 Wis., 323, where it was shown in the Supreme Court that by a mistake in drafting the judgment a material part was omitted it was held to be within the power of the Supreme Court to make the correction on appeal.

We do not believe that this court is bound to follow as the law of the case a statement of the Circuit Court of Appeals based upon an erroneous record which has now been corrected, the true record being set forth in the plea which is before this court

for interpretation, the truth of the facts set forth in the plea being admitted by demurrer.

This court has said, in *Messenger v. Anderson*, 225 U. S., 436:

“In the absence of statute the phase law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King v. West Virginia*, 216 U. S., 92, 100; *Remington v. Central Pac. Ry. Co.*, 198 U. S., 95, 99, 100. Of course this court, at least, is free when the case comes here. *Panama R. R. v. Napier Shipping Co.*, 166 U. S., 280; *U. S. v. Denver & Rio Grande, etc.*, 191 U. S., 84.”

Under the authorities cited above, it was plainly not the duty of the District Court to proceed further on a record which was admittedly erroneous. The cases cited by the Solicitor General are all cases in which it was sought after reversal on the same record to raise a point which was in the case on the first appeal. Plainly, in each of these cases, *the point raised was one which was waivable.*

In each of these cases, there was a specific direction by the Circuit Court of Appeals.

In the *Aspen* case, the mandate of the Circuit Court of Appeals directed the entry of a specific decree. (51 Fed., 339, 351.)

In *Brown v. Alton Water Company* the court entered a mandate with specific directions to the District Court to overrule the demurrers to the bill. (166 Fed., 840.)

In the *Metropolitan Water Company* case, the Supreme Court says (221 U. S., at 523) the

"judgment in the present case must be treated as equivalent as a direction to enter a final decree against the plaintiff for want of jurisdiction. * * * Under such a mandate nothing was left for the Circuit Court to do but to dismiss the bill."

In the *Westhus* case the Circuit Court of Appeals reversed the District Court with directions to overrule the demurrer to the answer and proceed in accordance with the opinion. And in the Supreme Court "the assignments of error involved a re-examination of all the issues, including those which had been adversely passed on by the Circuit Court of Appeals." (228 U. S., at 521.) And the plaintiff in error sought to re-argue all the questions which had been decided against it.

In the *Beatty* case, 232 U. S., 462, the question arose on a writ of error and petition for certiorari in the Supreme Court from the *first* appeal to the Circuit Court of Appeals. The court merely holds that the mandate of the Court of Appeals was not final and there was, therefore, no right of review by the Supreme Court.

Plainly none of these cases is an authority against the right of this court to hear this writ of error where the mandate of the Court of Appeals was not final. The questions raised in this writ of error in the District Court were not before the Circuit Court of Appeals and could not have been and it cannot be said, by any stretch of imagination, that we are seeking in any wise to review the opinion or the mandate of that court. Nor can it be said that we are seeking to review the action of the District Court in giving effect to that mandate, in the sense in

which that expression is used in the cases cited. With the record before the District Court, the matter was practically left open as to any matters subsequent to the plea or as to any other matters which were not and could not have been before the Court of Appeals.

Another distinction, however, between the cases cited by the Solicitor General and the case now before the court has been clearly overlooked. Under the Judiciary Code, which practically re-enacts the Act establishing the Court of Appeals, *the Supreme Court has exclusive jurisdiction of the writ of error in this case.*

See *Huguley Manufacturing Co. v. Galetton Cotton Mills*, 184 U. S., 290, at 295, where it is said:

"If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then if carried to the Court of Appeals, the decision of that court will not be made final and an appeal or writ of error would lie."

Here the writ of error brings in question only three pleas of former jeopardy based upon the rights granted plaintiff in error under the Constitution. It does not question the action of the court in any other respect except in so far as naturally followed the overruling of the pleas. Certainly if the statute gives this court exclusive jurisdiction, *it cannot be contended that the mere fact that the case has once been in the Circuit Court of Appeals on another phase can take that jurisdiction away and place it*

in the Circuit Court of Appeals. In the cases cited by the Solicitor General it is apparent that such was not the case, as appears particularly from the *West-hus* case, where the court clearly indicates there was jurisdiction in the Circuit Court of Appeals to issue the writ.

This court is peculiarly the forum for the determination of the rights guaranteed by the Constitution to the person charged with crime. A case involving the violation of the constitutional guarantees stands in a class by itself before this court, and it seems to us that no matter how the point appears in the record, it is clearly within the jurisdiction of this court and the duty of this court to protect a defendant if those constitutional guarantees are violated.

In *Ex Parte Nielsen*, 131 U. S., 176, it was held that if the double jeopardy "appears in the indictment or anywhere else in the record (of which the judgment is only a part) it is sufficient. In the present case it appeared in the record in the plea of *autrefois* convict, which was admitted to be true by the demurrer of the Government. We think that this was sufficient." In holding that the petitioner in that case should be released on his petition for habeas corpus, it is said (p. 183):

"In the present case it is true the ground for habeas corpus was * * * a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional

law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. * * * He was protected by a constitutional provision securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment."

See, also, *Ex Parte Mayfield*, 141 U. S., 107, at 116, where it is said:

"This court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, record."

If the Supreme Court can release on habeas corpus under the circumstances appearing in this record and can take jurisdiction on a petition for habeas corpus for the purpose of determining whether or not a person has been denied his constitutional immunity, certainly it has jurisdiction, on a direct writ of error, to determine the same question. Supposing that instead of suing out a writ of error to this court, the plaintiff in error had sued out the writ from the Circuit Court of Appeals which had affirmed the judgment of the District Court; that thereupon the plaintiff in error filed a petition for habeas corpus, would not this court on a direct ap-

peal or writ of error from the order of the District Court on that petition be bound, under the *Nielsen* case, to determine the merits of plaintiff in error's plea. It seems to us clear that it would be and it appears immaterial to us that the matter is presented to the court on the record as it now stands rather than on the record of a collateral proceeding. Under the opinion of the *Nielsen* case the judgment and the proceedings before Judge Landis subsequent to a reversal are clearly void and not merely erroneous. We certainly have a right to question that void judgment in a direct appeal to this court, and there is nothing in any of the several cases cited by the Solicitor General which requires us to pursue a vain appeal through the Circuit Court of Appeals.

IV.

Plaintiff in error has not taken any position in any other court inconsistent with his position here and is not estopped by any of the prior proceedings.

It appears clearly from our statement and from the foregoing argument on Points 1 and 3 of Solicitor General's brief that the Solicitor General's argument on this point is based upon a misapprehension of the opinion of the Circuit Court of Appeals and of the record.

The Government evades the point that among the assignment of errors on the first writ of error in the Court of Appeals plaintiff in error Shapiro assigned that "the sentence is excessive and should be limited to a fine only." (Sugg. Diminution of

Rec., p. 16.) The Government did not file a copy of the brief of the plaintiff in error, as it should have done, if it relied on an estoppel, when it brought up part of the proceedings in the Court of Appeals. Estoppels are not favored in law. The assignments of error in the Court of Appeals that the District Court was without jurisdiction to sentence Shapiro to the penitentiary on the plea of *nolo contendere* was intermixed with the other proposition that imprisonment cannot be had under such a plea. The court of Appeals held that *nolo contendere* is in the nature of a compromise and "so it was within the authority of the prosecuting officer to elect to stand, for the purposes of the plea on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission. Were the subsequent proceedings consistent with acceptance of the plea in that view, we are satisfied that no reversible error would appear in the allowance thereof." (Suggestions of Dim. Rec., p. 39.)

While insisting that the opinion of the Court of Appeals is the *law of the case*, the Solicitor General is actually sliding away from it, as will be seen from page 9 of his *main* brief. Speaking on this point he says:

"That idea developed much later through an *unwarranted* application of a rather *anomolous* doctrine of election, announced in its opinion by the Circuit Court of Appeals."

And yet he blames Shapiro for inconsistency!

We did not, as in the *Jones* case, 31 Fed., 725,

secure a new trial on our own motion. We insisted only that the judgment of the court and the proceedings subsequent to the plea were erroneous. Plaintiff in error was *subject at most to a new sentence consistent with the plea.*

Under the cases cited in Division 3 of our brief on the merits, it is clear that there has been no waiver and no estoppel by reason of the suing out of the former writ of error. Our position has been consistent all through this litigation. The only ambiguity in the record relating to the question of acceptance of the plea has been supplied by the plea of former jeopardy, which was admitted by the demurrer, and which under the ruling in the *Nielsen* case, 131 U. S., 176, is sufficient. It is now before this court stating the true situation.

Again, the Solicitor General on page 20 of his brief on this motion falls into the same error with which he charges us. He argues that the Circuit Court of Appeals was "confused" as to there being both felony and misdemeanor counts in the indictment. The part of the opinion referred to (Suggestion of Diminution, p. 38) stated correctly the fact that there were both felony and misdemeanor counts in each case. The fact that all the misdemeanor counts in the *Shapiro* case were *nolle prossed* after the entry of the plea could have had no bearing upon the right of the District Court to accept the plea when the misdemeanor counts were in the indictment.

We are satisfied that on the record before the court plaintiff in error is entitled to be discharged in his pleas of former jeopardy, and that he is en-

titled to a hearing before this court on that issue. There seems to us nothing in the argument of the Solicitor General which precludes this court from taking jurisdiction and passing upon the action of the District Court and we, therefore, respectfully urge that the motion to dismiss be denied.

Respectfully submitted.

ELIJAH N. ZOLINE,
Counsel for Plaintiff in Error.

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OFFICE SUPREME COURT, U. S.
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JAMES D. MAHER
CLERK

No. 93

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1914.

DAVID SHAPIRO,
Plaintiff in Error,

vs.

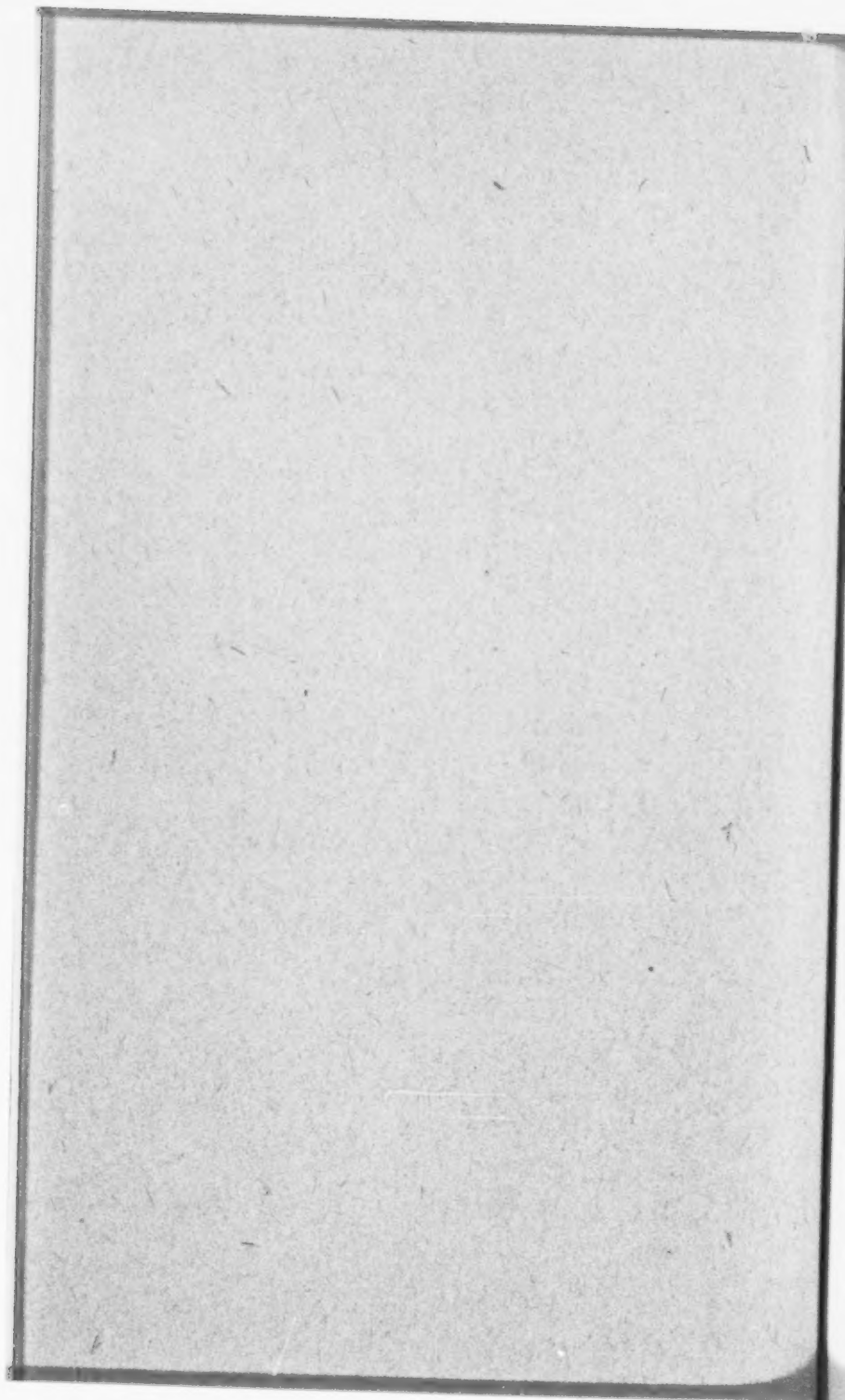
THE UNITED STATES,
Defendant in Error.

In Error to the District Court of the United States for the Northern
District of Illinois.

Certified Copies of Briefs of Plaintiff in Error and of
the United States Filed in the United States Court
of Appeals for the Seventh Circuit on First Writ
of Error Filed Here by Stipulation as Part of the
Papers in the Case Heretofore Filed by the United
States on Its Motion for Diminution of the Record
and Certiorari.

ELIJAH N. ZOLINE,
Attorney for Plaintiff in Error.

Geo. Hornstein Co., Printer, Chicago.



IN THE
United States Circuit Court of Appeals
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1911.

NO. 1777.

DAVID SHAPIRO,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the Northern
District of Illinois. Hon. K. M. LANDIS, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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Of Counsel.

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BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The above named plaintiff in error was indicted and charged with the violation of the Revenue Laws of the United States. He pleaded not guilty, but thereafter, by leave of court, withdrew his plea of not guilty, and the record shows that he "pleaded" *nolo contendere* to the indictment. (Rec., p. 12.)

The record further shows that on the 12th day of January, 1911, the court, *without a jury*, proceeded to hear witnesses in the case. (Rec., p. 13.)

On the 24th day of January, 1911, the court found the defendant below guilty as charged in the indictment, and sentenced him to two years' imprisonment at Leavenworth penitentiary and to pay a fine of \$10,000. (Rec., 14.)

Errors Relied Upon.

First: The District Court had no jurisdiction to pass judgment of imprisonment on this plaintiff in error in this case on a "plea" of *nolo contendere*, nor does the record affirmatively show that the plea was acted upon but on the contrary it shows that the court proceeded to hear evidence like a trial before the court.

Second: The District Court erred in sentencing this plaintiff in error on its own finding of guilty without a trial by jury.

Third: By the judgment of the said District Court of the United States, plaintiff in error was deprived of his liberty without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States of America.

Fourth: The sentence is excessive and should have been limited to a fine only.

POINTS.

I.

THE OFFENCE FOR WHICH PLAINTIFF IN ERROR WAS INDICTED AND CONVICTED WAS A FELONY.

Sec. 335 of the New Federal Criminal Code.
Fitzpatrick v. U. S., 178 U. S., 306.

II.

A DEFENDANT CHARGED WITH A FELONY CANNOT WAIVE JURY TRIAL OR ANY SUBSTANTIAL RIGHT.

Thompson v. Utah, 170 U. S., 343.
Grain v. U. S., 162 U. S., 636.
Ex parte McClusky, 40 Fed., 71.

III.

NOLO CONTENDERE IS NOT A PLEA THAT COULD BE TAKEN IN A FELONY SENTENCE EITHER UNDER THE COMMON LAW OR STATUTE.

2 Hale Pleas of the Crown, 235-258.
 4 Wendell's Blackstone Comm., Chap. 26, 322.
 1 Chitty Crim. Law, Vol. 1, Book 1, 434.
 Law of Eng., Earl of Halsbury, Vol. 9, p. 335.
 See Sec. 1032 of the Rev. St. of U. S.
 12 Cyc., 349.

IV.

THE ONLY PLEA UPON WHICH SENTENCE OF IMPRISONMENT COULD BE PRONOUNCED AGAINST THE DEFENDANT IN A CRIMINAL CASE AFTER THE WITHDRAWAL OF A PLEA OF NOT GUILTY, WOULD BE A PLEA OF GUILTY. THIS WAS NOT DONE IN THIS CASE. ON THE CONTRARY, THE RECORD SHOWS THAT EVIDENCE WAS HEARD BY THE COURT, AND THAT THE COURT, UPON HEARING OF THE EVIDENCE, FOUND THE DEFENDANTS GUILTY. THIS THE COURT COULD NOT DO. WHETHER THE DEFENDANTS WERE GUILTY OR INNOCENT WAS A QUESTION TO BE SUBMITTED TO A JURY.

V.

NOLO CONTENDERE, NOT BEING A PLEA IN A FELONY CASE, AS A BASIS FOR IMPRISONMENT RECOGNIZED BY THE COMMON LAW OR STATUTE, IT FOLLOWS THAT THE SENTENCE OF IMPRISONMENT IS VOID FOR WANT OF JURISDICTION.

Grain v. U. S., 162 U. S., 636, and cases cited.

Nolo contendere presented no issue to be tried. There must be a plea even in cases of misdemeanor if the court makes a finding.

Grain v. U. S., 162 U. S., 636.

VI.

SHOULD IT BE HELD THAT NOLO CONTENDERE IS A PLEA, AND THAT IT WAS ACCEPTED BY THE COURT, THEN IT WAS ERRONEOUS TO ENTER A PENITENTIARY SENTENCE AGAINST PLAINTIFF IN ERROR UNDER SUCH A PLEA, BECAUSE NOLO CONTENDERE, UNDER ALL THE AUTHORITIES, WAS AN OFFER ON THE PART OF THE ACCUSED TO SUBMIT TO A SMALL FINE, WHICH THE COURT AND PROSECUTING ATTORNEY WERE AT LIBERTY EITHER TO ACCEPT OR REJECT. BUT ONCE ACCEPTED, IT COULD NOT PROCEED TO METE OUT A PENITENTIARY SENTENCE. NO CASE WHERE SENTENCE TO A LONG TERM OF YEARS IN PRISON WAS IMPOSED ON A NOLO CONTENDERE IS RECORDED IN ENGLAND UNDER THE COMMON LAW AND NO SUCH CASE IS RECORDED IN THE UNITED STATES, EXCEPT WHERE THE PLEA IS PROVIDED FOR BY STATUTE.

VII.

UNDER THE COMMON LAW NOLO CONTENDERE WAS IN THE NATURE OF A MOTION TO SUBMIT TO A SMALL FINE AND WAS TAKEN ONLY IN CASES OF SLIGHT MISDEMEANOR.

Queen v. Templeman, 1 Salk., 55.

VIII.

IT FOLLOWS THAT IN ANY EVENT THE SENTENCE OF THE COURT WAS ERRONEOUS AND EXCESSIVE.

Bishop on Crim. Proc., Par. 802.

1 Colby on Crim. Law, 287.

2 Enc. of Pl. & Pr., 787.

BRIEF OF ARGUMENT.

The District Court upon the condition of this record had no jurisdiction to pass judgment in the aforesaid causes.

The District Court erred in sentencing plaintiff in error without a trial by jury, and deprived him of his liberty without due process of law.

These propositions will be treated together.

The offense for which plaintiff in error was tried and sentenced was by statute of the United States made a felony, and belongs to the class recognized in federal criminal procedure as infamous crimes.

Section 335 of the New Federal Criminal Code, in effect January 1, 1910, provides:

“All offences which may be punishable by death or imprisonment for a term exceeding one year, shall be deemed felonies; all other offences shall be deemed misdemeanors.”

The test is not the punishment which *is* imposed, but that which *may* be imposed under the statute.

Fitzpatrick v. U. S., 178 U. S., 306.

A crime punishable by imprisonment in the penitentiary is an infamous crime.

In re Classon, 140 U. S., 205.

Makin v. U. S., 117 U. S., 351.

Ex parte Wilson, 114 U. S., 418.

Makin v. U. S., 117 U. S., 348.

In re Bane, 121 U. S., 1.

In re Mills, 135 U. S., 263.

Under the Common Law There Was no Such Thing as a "Plea" of *Nolo Contendere*.

The pleas under the common law in felony cases were as follows: Demurrer to indictment, plea of misnomer or in abatement, plea of guilty, plea of not guilty, plea to the jurisdiction of the court; plea of pardon, plea of *autrefois* convict, or *autrefois* acquit. In misdemeanors special pleas in bar were sometimes permissible.

Common Law Authorities.

We shall give here a few excerpts from the leading common law authorities, showing that *nolo contendere* was not a plea at common law:

BLACKSTONE:

"We are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute. This is either, 1. *A plea to the jurisdiction*; 2. *A demurrer*; 3. *A plea in abatement*; 4. *A special plea in bar* or, 5. *The general issue*.

4 Wendell's Blackstone Comm., Chap. 26, of plea and issue, p. 332.

SIR MATHEW HALE:

"The prisoner upon his arraignment either confesseth, or pleads, or stands mute; the first of these is dispatched in the former chapter, the

second matter comes now to be considered, viz., his pleas upon his arraignment.

Pleas upon the arraignment are of four sorts.

1. Pleas that are declinatory of his trial, and such were antiently the plea of privilege of sanctuary, and the plea of clergy; the former is taken away by the statute of 21 Jac., chap. 28, the latter stands still in force; but because for the most part that benefit is claimed after conviction, and rarely before, I shall refer the whole business of clergy to a distinct examination, after I have done with the conviction of the prisoner.

2. Pleas in abatement of the indictment.

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, viz., Not guilty."

2 Hale Pleas of the Crown, 236.

"Regularly, where a man pleads any plea to an indictment or appeal of felony that doth not confess the felony, he shall yet plead over to the felony in *favorem vitae*, and that pleading over to the felony is neither a waving of his special plea, nor makes his plea insufficient for doubleness.

"And therefore, if he pleads any matter of fact to the writ or indictment, or pleads *autrefois* convict, or that *autrefois* acquit he shall plead over to the felony; and although he doth it not upon his plea, but his plea be found or tried against him, yet he shall not be thereby convicted without pleading to the felony and trial thereupon."

2 Hale Pleas of the Crown, 255.

"The arraignment of a prisoner, therefore, consists of these parts:

"1. The calling the prisoner to the bar by his name, commanding him to hold up his hand, which tho it may seem a trifling circumstance, yet it is of importance, for by holding up his

hand *constat de persona indictati* and he owns himself to be of that name.

"2. Reading the indictment distinctly to him in English, that he may understand his charge.

"3. Demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him *cul. prist*, and enters the prisoner's plea, then he demands how he will be tried, the common answer is, by God and the country, and thereupon the clerk enters *po. se*, and prays to God to send him a good deliverance.

"But if the prisoner hath any matter to plead either in abatement, or in bar of the indictment, as misnomer, *autrefois* acquit, *autrefois* convict, a pardon, &c. then he pleads it without immediate answering to the felony; but in some cases *si trove ne soit*, then to the felony not guilty, *de quo postea*. And thus far what the arraignment is."

2 Hale Pleas of the Crown, 218.

HAWKINS:

"Pleas in chief are either, in bar; or, the general issue."

Hawkins' Pleas of the Crown, Bk. 2, Vol. 1, Chap. 35, 515.

Chitty in his work on Criminal Law, Vol. I, Book 1, p. 434, classifies pleas in criminal cases as follows:

"1. Pleas to the jurisdiction.

"2. Demurrers.

"3. Dilatory pleas.

"1. Declinatory of trial. (These have fallen in disuse. See p. 443 of same volume.)

"2. In abatement.

"4. Pleas in bar of the indictment.

- "1st mixed of record and fact.
- "1. *Autrefois* acquit.
- "2. *Autrefois* attaint.
- "3. *Autrefois* convict.
- "4. Convict of another felony, and had his clergy.
- "5. Matter of record, pardons, etc.
- "5. Pleas to the matter of indictment.
- "1. Not guilty.
- "2. Special pleas."

(These were special pleas in bar in misdemeanors. See p. 471 of same book.)

"When the defendant has any matter to plead in abatement, as misnomer, *autrefois* acquit, a pardon, etc., this is the proper time for him to introduce it, before he pleads to the felony. But there are instances of his being permitted, as a matter of favor, after the plea of not guilty has been recorded, to withdraw it, and plead to the jurisdiction."

Chitty's Crim. Law, Book 1, Vol. 1, Chap. 10, 424.

Nolo contendere was not a plea under the common law, but to the contrary was resorted to at common law to *avoid* entering a plea. It is a declaration, as its name indicates, that the defendant will not contend as to his guilt or innocence.

Mr. Hawkins speaks of it as follows:

"An implied confession is where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and *desiring to submit to a small fine*; in which case, if the court think fit to accept of such submission, and make an entry that the defendant *posuit se in gratiam regis, without putting him to a direct confes-*

sion, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is *quod cognovit indictamentum*."

Hawkins' Pleas of the Crown, Vol. 2, Chap. 31, p. 466.

Mr. Hawkins treats it in his book under the heading of "Confession and Demurrer," and not under "Plea."

In the only recorded case under the common law practice this procedure is treated as a motion to submit to a small fine.

Queen v. Templeman, 1 Salkelds, 55.

No common law authority can be found where *nolo contendere* was accepted in a felony case and where the sentence was more than a fine.

American Authorities.

Referring to the aforesaid extract from Hawkins, Mr. Bishop in his work on Criminal Procedure, 3rd Ed., par. 802, says:

"The plea of *nolo contendere* is a formal declaration by the defendant in court, that he will not contend with the state or other prosecuting power.

"It is pleadable only in light misdemeanors, and by leave of court. The difference between it and guilty appears simply to be, that, while the latter is a solemn confession which may bind the defendant in other proceedings, the former is a confession only for the purpose of the particular case."

See to the same effect, 2 Enc. of Pl. & Pr., 787.

The latest American authority "Cyc." speaking of *nolo contendere*, says it is not a plea in the strict sense of the word.

12 Cyc., 349.

Reasons for Nolo Contendere.

The process of arraignment and plea was so grow-some and unpleasant under the common law that in cases of slight misdemeanor *nolo contendere* was occasionally resorted to by arrangement between the prisoner, the crown prosecutor and the court when a small fine was accepted.

According to Hawkins, when a prisoner stood mute, he was placed in some low, dark room, and there laid on his back without any manner of covering, as many weights were laid upon him as he could bear and more, and he was to have no manner of sustenance but of the worst bread and water. He was not to be allowed to eat the same day in which he drank, nor drink the same day on which he ate, and that was to continue until he died.

2 Hawkins' Pleas of the Crown, Sec. 16.

To provide a rational means to place the cause at issue where the defendant stood mute Congress, as well as most of the states, passed statutes requiring, when a prisoner stands mute, that the court shall enter a plea of not guilty for him.

Section 1032 of the Revised Statutes of the United States, provides:

"(Prisoners standing mute, etc.) When any person indicted for any offense against the

United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

It is respectfully submitted that since the passage of the above Section 1032 there can be no such thing as *nolo contendere* as a plea in the Federal Court, because a plea of *nolo contendere*, as its name indicates, is a declaration that the defendant will not contend as to his guilt or innocence and is an expedient to avoid a plea.

To sentence a man to a long term of imprisonment upon such a plea would be as far from justice as was the rule of common law when a prisoner stood mute, which Congress intended to change.

The Defendant in This Case Stood Mute and Under the Statute a Plea of Not Guilty Should Have Been Entered by the Court.

What Amounts to Standing Mute.

BLACKSTONE SAYS:

"Regularly, a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or 2. Answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or 3. Upon having pleaded not guilty, refuses to put himself upon the country. If he

says nothing, the court ought, *ex officio*, to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner who hath never pleaded and can say nothing in arrest of judgment, is a point yet undetermined.

"If he be found to be obstinately mute (which a prisoner hath been held to be that hath cut out his own tongue), then, if it be on an indictment of high treason, it hath long been clearly settled that standing mute is equivalent to a conviction, and he shall receive the same judgment of execution. *And as in this, the highest crime, so also in the lowest species of felony, viz., in petit larceny, and in all misdemeanors, standing mute hath always been equivalent to conviction.* But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the felony, but should, for his obstinacy, have received the terrible sentence of penance, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone forte et dure*."

4 Wendell's Blackstone Comm., Chap. 25, 324.

CHITTY SAYS:

"When the prisoner, upon his arraignment, totally refuses to answer, *insists upon mere frivolous pretences*, or refuses to put himself upon

the country, after pleading not guilty, he is said to stand mute. * * *

Chitty's Crim. Law, Bk. 1, Vol. 1, Chap. 10, 424.

"If the prisoner answer, but merely foreign to the purpose, and *refuse regularly to plead*, so as to warrant his trial, it is evident there can be no occasion for any inquest of office, for his obstinacy and his ability to speak are sufficiently apparent."

Chitty's Crim. Law, Bk. 1, Vol. 1, Chap. 10, 425.

HAWKINS SAYS:

"As to the first point, viz., In what cases a man shall be said to stand mute.

"Sec. 1. I take it to be agreed, that he who answers *impertinently*, or *ineffectually*, or *refuses to put himself upon his trial in such manner as the law directs*, may as properly be said to stand mute as he who makes no answer at all; as where a man refuses to plead a plea in chief, or the general issue, but insists on some frivolous defense, or even to plead a good dilatory plea, and refuses to plead over to the felony, in which case after such a plea is found against him, he shall not be admitted to plead in chief, but shall be adjudged to his penance in the same manner as if he had made no plea at all. And so shall he who pleads a good plea in chief, or the general issue, but refuseth to put himself upon the inquest (that is, to be tried by God and his country if a commoner, or by God and his peers if a lord) or to wage battle where such trial is allowed."

Hawkins Pleas of the Crown, Bk. 2, Vol. 1, Chap. 30, 458.

Exception to Rule:

"Sec. 3. But it is clear, that he who demurs in law to an indictment or appeal, shall not be esteemed to stand mute, nor be dealt with as such, as having refused a trial by his country, for he puts himself upon a trial by the court, which is the proper trial of a matter in law.

"Sec. 4. Also it seems clear, that after a man hath confessed himself guilty, or pleaded, and put himself upon his country he shall not afterwards be demeaned as one that stands mute in respect to his subsequent silence; *but the jury shall be charged, and the trial shall proceed, and the like judgment shall be given as in common cases.*"

Hawkins' Pleas of the Crown, Bk. 2, Vol. 1, Chap. 30, 459.

Waiver.

A defendant in a criminal case charged with a felony cannot waive any rights as to arraignment and plea or any rights and privileges conferred on him by law.

Crain v. U. S., 162 U. S., 636.

Thompson v. City of Utah, 170 U. S., 343.

Ex parte McClusky, 40 Fed., 71.

Nolo Contendere Not Being a Plea no Issue Was Presented to the Court and no Plea in Fact Was Made Before Trial and Sentence.

Crain v. U. S., 162 U. S., 625-650, with the cases there cited, is a direct authority upon the proposition that in a case of felony the defendant cannot waive the entering of a plea, and that the court will not

speculate as to what took place regarding same. Quoting from *Pointer v. United States*, 151 U.S., 396, the court says:

"The record of a criminal case must state what will affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence itself."

In the *Grain* case at page 644, the court says:

"Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused and then guess again as to what was the nature of that plea?"

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities about this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the

indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently, such a defect in the record of a criminal trial is not cured by U. S. Rev. Stat., par. 1025, but involves the substantial rights of the accused.

"It is true that the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and the due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law and essential to a valid trial was taken in the trial court; otherwise the judgment will be erroneous. The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried 'the issue joined,' unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

Sentence is Excessive.

If it should be held that in the federal courts, *nolo contendere* is applicable in felony cases as an offer

to pay a fine, then it is respectfully submitted that the District Court erred in imposing a penitentiary sentence in the cases at bar. The statute under which plaintiffs in error were indicted permitted the taking of a fine. *Nolo contendere* is an offer to submit to a small fine.

The court should not in all fairness have gone beyond that offer to pay a fine. If it could not accept it, it should have re-entered the plea of not guilty.

SAYS SIR MATTHEW HALE:

"The confession is either simple, or relative in order to the attainment of some other advantage.

"That which I call a simple confession is, where the defendant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead.

"If it be but an extrajudicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus shewn it appear to be felony, the court will not record his confession, but admit him to plead to the felony not guilty."

2 Hale Pleas of the Crown, 225.

"The other incident to arraignments, exclusive of the plea, is the prisoner's actual confession of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confes-

sion, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it and plead to the indictment."

4 Wendell's Blackstone Comm., Chap. 25, 329.

"And regularly in all cases of felony or treason, where a man pleads a special matter, tho he conclude his plea with not guilty to the felony, or doth not conclude it so, yet if his plea be tried or found, or ruled against him, he shall be put to his plea of not guilty and be tried for the felony, for tho a man shall lose his land in some cases for mispleading, yet he shall not lose his life for mispleading."

2 Hale Pleas of the Crown, 256.

It follows that the sentence in any event is erroneous and excessive, as to the imprisonment part of the judgment.

For the reasons aforesaid we respectfully pray that the judgment of the District Court in the above entitled cause be reversed.

Respectfully submitted.

WILLARD M. McEWEN,

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E. N. ZOLINE,

WEISSENBAUGH, SHRIMSKI & MELOAN,

Of Counsel.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1911.

NO. 1777

DAVID SHAPIRO,
Plaintiff in Error.
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District
Court of the United
States, Northern Dis-
trict of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

JAMES H. WILKERSON,
United States Attorney,
HARRY A. PARKIN,
Assistant United States Attorney,
Attorneys for Defendant in Error.

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STATEMENT OF THE CASE.

The writ in this case involves a decision upon one question only—a question of pleading. Plaintiff in error was indicted for numerous violations of the Internal Revenue laws, in connection with a large number of other wholesale and retail liquor dealers, the alleged violations growing out of the operations of what was known as the Illinois Fruit Dis-

tillery, in Chicago. There were 13 counts to the indictment charging, in different counts, the defrauding of the Government out of revenue tax on approximately 20,000 proof gallons of distilled spirits. The indictment was returned on June 21, 1910, and a plea of not guilty entered by the plaintiff in error three days later. On January 3, 1911, plaintiff in error appeared in open court, and, by leave of the court, withdrew his plea of not guilty to the indictment, and, being arraigned a second time, pleaded *nolo contendere*. Thereafter, his case was called for disposition and of his own motion he took the witness stand, admitting the charges in the indictment practically in their entirety, and, on January 24, 1911, the court, upon the plea and the evidence adduced, sentenced plaintiff in error to two years' imprisonment in the penitentiary and to pay a fine of \$10,000.

No objection or exception of any kind to the action of the court in permitting the withdrawal of his plea of not guilty and to the entry of the plea of *nolo contendere* was made or saved, and no objection or exception to the judgment and sentence of the court was made or saved, and the only point urged is that the court acted without jurisdiction in imposing a sentence of imprisonment upon the plea of *nolo contendere*. It is admitted that the judgment is valid so far as the fine is concerned.

BRIEF.

I.

"NOLO CONTENDERE" IS A PLEA WELL RECOGNIZED AND
OF ESTABLISHED USE IN AMERICAN JURISPRUDENCE.

12 Encyclopedia of Pleading & Practice,
page 354.

United State v. Hartwell, 3 Cliff. (U. S.),
221.

Commonwealth v. Ingersoll, 145 Mass., 381.

State v. Judges of Hudson County, 46 N.
J. Law, 112.

State v. O'Brien, 25 Atlantic (R. I.), 910.

Birchard v. Booth, 4 Wis., 67.

State v. Siddall, 103 Maine, 144.

State v. La Rose, 71 N. H., 436.

Commonwealth v. Holstine, 132 Penna.
State, 357.

2 Hawkins, Pleas of Crown.

1 Chitty, Criminal Law, 430.

U. S. v. Wright, Case No. 3800 Dist. Court,
Nor. Dist. Ill.

II.

THIS PLEA, IN ITS EFFECT UPON THE CASE IN WHICH IT
IS PLEADED, IS EQUIVALENT TO A PLEA OF GUILTY.

State v. La Rose, 71 N. H., 436.

Commonwealth v. Ingersoll, 145 Mass., 381.

State ex rel. v. the Judges, 46 N. J. Law, 112.

State v. Siddall, 103 Maine, 144.

State v. Herlihy, 102 Maine, 310.

U. S. v. Hartwell, 26 Fed. Cases, 196.

III.

SENTENCE IS PRONOUNCED IMMEDIATELY UPON THIS PLEA.
IT IS NOT NECESSARY TO ADJUDGE THE DEFENDANT
GUILTY.

Commonwealth v. Horton, 9 Pickering, 206.
2 Encyclopedia & Practice, p. 787.
Commonwealth v. Ingersoll, 145 Mass., 381.
Commonwealth v. Holstine, 132 Penna.
State, 357.

IV.

A DEFENDANT MAY BE IMPRISONED AS WELL AS FINED
UPON THIS PLEA, IN LIKE MANNER AS UPON A PLEA OF
GUILTY.

State ex rel. v. Judges of Quarter Sessions,
46 N. J. Law, 112.
Commonwealth v. Holstine, 132 Penna.
State, 357, 362.
State v. Conway, 20 Rhode Island, 270.
U. S. v. Charles S. Wright, Dist. Court, Nor.
Dist. Illinois.

V.

IT BEING THE RULE THAT JUDGMENT FOLLOWS IMMEDI-
ATELY UPON THE PLEA OF NOLO CONTENDERE, THE
"FINDING" OF THE DISTRICT COURT WAS SURPLUSAGE
AND HARMLESS ERROR. INDEED, IT IS THE PRACTICE IN
SOME JURISDICTIONS TO ENTER SUCH A FINDING ON
THIS PLEA PRIOR TO JUDGMENT.

Commonwealth v. Ingersoll, 145 Mass., 381.
State v. La Rose, 71 N. H., 435.
Commonwealth v. Holstine, 132 Penna.
State, 357.
And cases *supra*.

ARGUMENT.

I.

"NOLO CONTENDERE" IS A PLEA WELL RECOGNIZED AND OF ESTABLISHED USE IN AMERICAN JURISPRUDENCE.

An examination of the authorities upon the question of the validity of the plea of *nolo contendere* discloses the fact that it is a well recognized form of pleading in use in very many, if not all, of the commonwealths of the United States. Among the leading jurisdictions may be cited the courts of the United States, Massachusetts, New Jersey, Rhode Island, Wisconsin, Maine, New Hampshire, Pennsylvania, our own District Court and others. And, in this connection, it must be remembered that, a plea of this kind being, as we shall show, equivalent to a plea of guilty, seldom, if ever, are appeals or writs of error taken from the judgment and sentence imposed thereunder by the *nisi prius* court, and, while reported cases may not appear in the books to be as numerous as reported cases upon other points in criminal law, we must not therefore conclude that their absence argues its non-user; we might with greater reason argue that the great number of cases appearing in the books upon this proposition incline us to the conclusion that its use is not restricted but extremely general throughout the various jurisdictions.

One of the earliest reported cases arose in Massachusetts, in 1829, wherein James Horton, defendant to an indictment for violation of the retail liquor

laws, entered a plea of *nolo contendere* to the indictment, and, upon *scire facias*, brought upon the recognizance given by the defendant to observe the laws, it was held that the force of the plea entered by the defendant to the indictment was equivalent to a plea of guilty in the suit to recover the amount of the recognizance, and judgment was entered for the commonwealth.

It may be interesting to note the suggestions which, at this early day in American jurisprudence, occurred to the judge deciding the case. He says:

“The plea of *nolo contendere* is an implied confession of the offense charged. It is discretionary with the court to receive it or not.

The advantage which a party obtains by such an answer properly pleaded, is, that he is not estopped to plead not guilty to an action for the same facts as he would be upon a plea of guilty. * * * So far as the commonwealth is concerned, the judgment of conviction follows as well the one plea as the other.”

Commonwealth v. Horton, 9 Pickering, 206.

The earliest reported case appearing in the federal courts, it is believed, is *United States v. Hartwell*, arising in the Circuit Court for the District of Massachusetts, in 1869, upon an indictment charging the defendant, as assistant treasurer at Boston, with having loaned the public funds. Hartwell was found guilty, and, upon motion for a new trial, the question was presented as to the distinction, if any, between a plea of *nolo contendere* and a plea of guilty, and the court, in denying the distinction, made the following statement:

“Attempt was made at the argument to set

up a distinction between the plea of *nolo contendere* and the plea of guilty, but the suggestion is entitled to no weight as it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment."

United States v. Hartwell, 26 Fed. Cas., 196; 3 Cliff., 221.

Another early case arose in the west, in the State of Wisconsin, as early as 1854. In this case, the Supreme Court of Wisconsin discussed the meaning of the plea of *nolo contendere*, and came to the same conclusion respecting its effect as did Putnam, judge, in *Commonwealth v. Horton*, quoting from the Horton case and other authorities of like effect. No question apparently occurred to the court respecting the existence and use of the plea. In Massachusetts, there are a number of reported cases upon the proposition at issue here. In Pennsylvania, the plea is a plea of "*non volo contendere*," and of it the court says:

"This, although not technically a plea of guilty, is so in substance, and justifies the court in imposing sentence."

Commonwealth v. Holstine, 132 Penna. State, 357, 361.

In Rhode Island, the plea is treated as in the above enumerated cases, and, as the court says:

"The plea of *nolo contendere* interposed by the defendant, like a demurrer, admits, for the purposes of a case, all the facts which are well pleaded; that is to say, it is a confession of guilt, so far as this particular case is concerned, and places the defendant in the same position,

for the purposes of this motion, as though he had pleaded guilty, or been found guilty by the verdict of a jury."

State v. O'Brien, 25 Atlantic, 910.

In the Commonwealth of Maine, the Supreme Court say of the plea:

"A plea of *nolo contendere* is, in its effect upon the case, equivalent to the plea of guilty.
* * * The judgment of conviction follows upon such a plea as well as a plea of guilty."

State v. Siddall, 103 Maine, 144.

It will thus be seen that, far from being a pleading unknown to American jurisprudence, it is a plea which has been in use since as early as 1829, and been universally accepted without question in the great commonwealths of the United States, and treated uniformly by the highest courts in those jurisdictions. The quotations from cases above suggested are, it seems, sufficient, both in number and in their variety of expression, to indicate to the court the general and widespread use and acceptance of this plea in American jurisprudence.

In our own jurisdiction it has been in use for many years in the Federal Court, one of the late cases in the Northern District of Illinois being *United States v. Charles S. Wright*, No. 3800, District Court. Wright was indicted March 12, 1907, for a violation of Section 3893 R. S., entered a plea of not guilty on March 18th, which was withdrawn and a plea of *nolo contendere* entered. Thereupon the court sentenced the defendant to serve five years at hard labor in the penitentiary and to pay a fine of \$5,000. The dockets of the District Court show many similar cases of the use of this plea.

II.

THIS PLEA, IN ITS EFFECT UPON THE CASE IN WHICH IT IS PLEADED, IS EQUIVALENT TO A PLEA OF GUILTY.

It is next contended on behalf of defendant in error that this plea is equivalent, in the case in which it is entered, to a plea of guilty so far as proceedings on the indictment, including judgment and sentence, are concerned. The authorities are uniform in holding to this rule. As said in *Commonwealth v. Ingersoll*.

"The plea of *nolo contendere*, when accepted by the court, is in its effect upon the case equivalent to a plea of guilty. * * * The judgment of conviction follows upon such a plea as well as upon a plea of guilty."

Commonwealth v. Ingersoll, 145 Mass., 381.

That a plea of *nolo contendere* is equivalent to a plea of guilty is well illustrated in a case arising under a statute providing "that in no case hereafter in this state in which a person shall have pleaded guilty to any indictment or accusation shall a writ of error have the effect of staying the proceedings upon the judgment and sentence which the court or any judge thereof may have pronounced against the person or persons obtaining or prosecuting such writ of error." (Act of 1883, New Jersey Laws.)

The defendant who applied for the stay of proceedings upon the writ of error had in the court below entered a plea of *nolo contendere* to an indictment. Judgment was pronounced, sentencing

the prisoner to the state penitentiary. A writ of error was then sued out of the Supreme Court to remove the judgment to that court from the trial court. The defendant then petitioned for bail and for an order of *supersedeas* upon the judgment of the lower court. Both of these motions were refused upon the ground that the plea of *nolo contendere* was, so far as concerned the judgment and sentence in the case, equivalent to a plea of guilty, and so, by force of the provisions of the statute above quoted, the taking of the writ of error could not stay the execution. In its opinion, the Supreme Court say:

“The object of this legislation is apparent. It is to prevent delay in the execution of the criminal law, while writs of error are pending, whenever the defendant has confessed the truth of the accusation against him, and not contested the charge before a jury. A plea of *nolo contendere* is an implied confession of the crime of which he is charged. 1 Burns Just., 388; 2 Hawk. P. C., 225. The difference between this implied confession and the express confession by plea of guilty is, that after the latter ‘not guilty’ cannot be pleaded to an action of trespass for the same injury, whereas it may at any time be done after the former. 1 Chitty Crim. Law, 293. In fact, the only difference between the significance of the two pleas is in the force each has upon a collateral proceeding. The implied confession is only for the purpose of the prosecution in the course of which it is entered, while the plea of guilty in that form may be used against the defendant in a civil suit. 1 Bish. Crim. Proc., Sec. 802; 1 Wharton Crim. Law, Sec. 533. * * * We think that the relator by his plea has placed himself in a position where, by the terms of the act of 1883 (the act above quoted) he is not entitled to a

stay of proceedings upon the judgment by reason of his taking a writ of error. The writ is refused."

Peacock v. Judges of Quarter Sessions, 46 N. J. Law, 112.

It will thus be seen that courts not only hold that the pleas of *nolo contendere* and guilty are equivalent so far as the cause is concerned, but go to the extent of even refusing the customary writ of *supersedeas* to defendants who enter such pleas, thereby placing themselves in the same situation as upon a plea of guilty.

In *State v. La Rose*, the court say:

"This plea, like a demurrer, admits for the purposes of the case all the facts which are well stated, but is not to be used as an admission elsewhere. * * * Between other parties, as in a civil suit, a former judgment, whether upon a plea of not guilty, *nolo contendere*, or guilty, would be incompetent; but as between the parties to the proceeding, the state and the defendant, the validity of the judgment of conviction does not depend upon the character of the plea."

State v. La Rose, 71 N. H., 435, 439.

Some courts even go to the extent of holding that a conviction upon a plea of *nolo contendere* is equivalent to a conviction by a jury, and may be used for like purposes as records of convictions by juries. In *State v. Herlihy*, in the trial of a criminal complaint, the defendant took the stand and testified in his own behalf. Upon cross-examination, for the purpose of impeaching his credibility as a witness, there were offered the records of prior proceedings wherein the defendant had been convicted upon pleas

of *nolo contendere*, and the court, in ruling upon the admissibility of these records, as being "convictions" proper to affect the credibility of the witness, said:

"The question then, is what must the record contain in order to make it admissible for the purpose of proving the conviction of a witness and as affecting his credibility. This question has been recently settled in this state with reference to the admissibility of the record of a conviction, for this precise purpose in the case of *State v. Knowles*, 98 Maine, 429, wherein it is said: 'It matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue either of law or of fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted; and the record of that conviction, or the docket entries where no extended record has been made, are admissible against him to prove such conviction.'

The records of these convictions show that there was no issue of law or of fact to be determined; both cases were ready for sentence, and sentence was in fact imposed in both cases. The plea of *nolo contendere* is an implied confession of the offense charged, the judgment of conviction follows that plea as well as the plea of guilty. * * * We have no doubt of the admissibility of the records offered and admitted in the case at bar for the purpose of affecting the credibility of the respondent who had become a witness in his own behalf."

State v. Herlihy, 102 Maine, 310, 315.

If sentences imposed upon pleas of *nolo contendere* are "convictions" proper to impeach a witness, they are "convictions" in the same sense that "convictions" upon verdicts are "convictions" and

the record in this case shows a conviction in every sense of the word.

III.

SENTENCE IS PRONOUNCED IMMEDIATELY UPON THIS PLEA. IT IS NOT NECESSARY TO ADJUDGE THE DEFENDANT GUILTY.

Nolo contendere, then, being a plea and having the same effect as a plea of guilty in the case in which it is entered, it naturally follows that sentence should be pronounced immediately upon the entry of the plea. And this is the rule.

As said by the Supreme Court of Massachusetts:

"So far as the commonwealth is concerned, the judgment follows as well the one plea as the other, and it is not necessary that the court should adjudge that the party was guilty, for that follows by necessary legal inference from the implied confession. But the court thereupon proceeds to pass the sentence of the law affixed to the crime."

Commonwealth v. Horton, 9 Pickering, 206.

In speaking of the plea of *nolo contendere*, the Encyclopedia of Pleading and Practice says:

"Sentence forthwith.—Upon this plea it is not necessary or proper that the court should adjudge the party to be guilty but sentence should be passed forthwith."

2 Encyclopedia of Pleading and Practice, p. 787.

In a case already cited under another heading, this observation is made respecting the sentencing of the defendant upon the plea:

"If the plea is accepted, it is not necessary or

proper that the court should adjudge the party to be guilty for that follows as a legal inference from the implied confession, but the court proceeds thereupon to pass the sentence of the law."

Commonwealth v. Ingersoll, 145 Mass., 381.

And, again, upon the entry of a plea of *nolo contendere* under a statute prohibiting the selling of spirituous liquors without a license, the defendant was sentenced, and, upon appeal, in disposing of the authority of the *nisi prius* court to sentence the defendant immediately, the Supreme Court say:

"The defendant, appellant, was indicted in the court below for selling liquor without a license. To this indictment he pleaded *non volo contendere*. This, although not technically a plea of guilty, is so in substance, and justifies the court in imposing sentence."

Commonwealth v. Holstine, 132 Penna. State, 357, 361.

Great stress is laid by counsel for plaintiff in error in this case upon the fact that the court sentenced the defendant upon the plea without trial by jury. But it is respectfully contended, under the authorities above quoted, and numerous others cited to other points in this brief, that the court was entirely justified and its duty was to act as it did act in the case at bar and sentence the defendant upon the plea immediately. No issue of fact remained to be tried, the defendant had impliedly confessed his guilt, had taken the witness stand and admitted it, in addition to entering the formal plea of *nolo contendere*, and it would seem that no right of the defendant, under this series of circumstances, could

possibly have been infringed upon, nor any of the processes of the law which the due administration of justice requires denied him.

Counsel invokes the protection of the Fifth Amendment in behalf of his client in assignment three of his brief and in assignment four urges: "The sentence should have been limited to a fine only." (Brief, 2.)

These, it is respectfully urged, are inconsistent. "Property" is just as precious and entitled to the same "due process of law" as is "liberty," the second of the trio of rights protected by the Fifth Amendment, and counsel must admit either that the plea, if good to take property (a fine), is also proper to support a judgment of imprisonment or is invalid for either a fine or imprisonment. "Due process of law" gives to both liberty and property equal protection. It recognizes no favorites.

IV.

A DEFENDANT MAY BE IMPRISONED AS WELL AS FINED UPON THE PLEA OF NOLO CONTENDERE, IN LIKE MANNER AS UPON THE PLEA OF GUILTY.

Counsel for plaintiff in error makes the bald assertion that "no case where sentence to a long term of years in prison was imposed upon a *nolo contendere* is recorded in England under the common law, and no such case is recorded in the United States except where the plea is provided for by statute," and lays great stress upon the fact that the

defendant in this case was sentenced to a fine and imprisonment upon the plea of *nolo contendere*. In reply to this argument, counsel's attention is directed to the fact that, under those counts of the indictment to which plaintiff in error entered his plea of *nolo contendere*, with the exception of one, the only judgment which the court was authorized under the law to impose upon plaintiff in error required a prison sentence. And it must be assumed that plaintiff in error's counsel at the time of the entry of the plea knew, or at least was chargeable with knowing, what the law under which he entered the plea required the court to do. In addition, counsel for defendant in error deny the bald assertion made by counsel respecting the dearth of adjudicated cases wherein imprisonment was imposed on a plea of *nolo contendere*.

Upon this latter point, we find a number of cases wherein prison sentences were imposed upon pleas of *nolo contendere*.

On an indictment charging Peacock, Cory and Harrington with conspiracy under the laws of New Jersey, Harrington, one of the defendants, entered a plea of *nolo contendere* to the indictment. After a motion in arrest of judgment had been overruled, sentence was pronounced, and Peacock imprisoned in the state penitentiary, the statute required a sentence not exceeding two years at hard labor.

Peacock v. Judges of the Court of Quarter Sessions, 46 N. J. Law, 112.

And it must be remembered in connection with the above case that counsel, under Point I of his brief,

makes the statement: "A crime punishable by imprisonment in the penitentiary is an infamous crime," and cites a number of cases to this effect, so that, if his statement is true that imprisonment in the penitentiary makes the crime infamous, Peacock was, therefore, under counsel's own argument, tried, convicted, and sentenced for an infamous crime upon a plea of *nolo contendere*.

It is doubtless not important whether a defendant, under a given state of facts, shall be sentenced to a longer or shorter period of time upon a plea of *nolo contendere*. The question is, and the only question, can a defendant on such a plea be imprisoned at all? If the court is authorized to imprison a defendant at all upon a plea of this character, it cannot alter the legal situation to impose a sentence of two years or of thirty days, and it is respectfully urged that the action of the court in making a prison sentence months or years, providing the range of sentence be within the discretion of the court, under the law, could not change the alleged constitutional right of the defendant under the given plea. Under a statute of Pennsylvania, the penalty clause provided:

"Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than five hundred dollars, nor more than five thousand, and undergo an imprisonment in the county jail of not less than three months, nor more than twelve months."

In a case arising under this statute on an indictment, a defendant entered a plea of *nolo contendere*

and was sentenced to pay a fine of five hundred dollars and to be imprisoned in the county jail for three months. An appeal was taken to the Supreme Court to reverse the judgment and sentence upon the ground that it was excessive, one of the contentions here. In disposing of the appeal, the Supreme Court say:

“It was contended that the sentence should have been under the second paragraph of said section, which provides a lighter punishment where persons having a license are convicted of violating any of the provisions of the license laws. For the reasons already given, *we think the sentence was proper. It follows the indictment strictly.*”

Commonwealth v. Holstine 132 Penna. State, 357, 362.

As heretofore suggested, it has been the practice for many years to accept pleas of this character in felony cases in the United States courts for this district, and these cases can be found on the dockets of our District Court. It is an almost daily practice. Among others is the Wright case (*U. S. v. Charles S. Wright*, Case No. 3800 District Court, Northern District of Illinois), wherein Wright, on a plea of *nolo contendere*, was sentenced and served five years' imprisonment.

These cases are cited to refute the assertion of counsel and to sustain the contention of defendant in error respecting the authority and custom of courts to imprison upon the plea in the case at bar. Others may be found in which short terms of imprisonment, in addition to fines, under pleas of *nolo*

contendere have been sustained, but as suggested above, it is believed that the court will agree with the proposition that the question in the case at bar goes to the power and authority of the court to imprison *at all*, and this power and authority cannot be affected by its right to sentence for a longer or shorter period. If a court has the power to imprison under a plea of *nolo contendere*, it is respectfully suggested that it may, with equal authority, imprison for the maximum amount of time provided by the statute under which the plea is entered as it can imprison for the minimum amount of time provided by the statute. It has also been held that the imposition of a greater or a lesser period of imprisonment under a statute giving a maximum and minimum was a matter of discretion, not a matter of power. And so, in the case at bar, if the court was authorized to impose a sentence of imprisonment at all upon the defendant and has, as in the case at bar, imposed a sentence within the maximum fixed by the statute under which the plea was entered, it has used its discretion, and that discretion cannot be reviewed by an appellate tribunal so long as discretion was not arbitrarily abused. And it was not under the presumption which must be indulged in favor of the proceedings on this record.

V.

IT BEING THE RULE THAT JUDGMENT FOLLOWS IMMEDIATELY UPON THE PLEA OF NOLO CONTENDERE, THE "FINDING" OF THE DISTRICT COURT WAS SURPLUSAGE AND HARMLESS ERROR. INDEED, IT IS THE PRACTICE IN SOME JURISDICTIONS TO ENTER SUCH A FINDING ON THIS PLEA PRIOR TO JUDGMENT.

Counsel makes a point in his brief upon the so-called "finding" of the trial court. The record shows that upon the sentencing of the defendant the court, as customary, asked the plaintiff in error if he had anything to say why sentence and judgment should not be pronounced upon him, then found plaintiff in error guilty and proceeded to pass sentence. It is contended on behalf of defendant in error that this action of the trial court in making a formal finding of guilty upon the plea was simply surplusage, and not an error tending in the slightest degree to the prejudice of the defendant. It is to borne in mind that all of the cases upon the meaning of the plea in this case hold that the proper procedure is to pronounce sentence immediately upon the entry of the plea, and some of them, notably *Commonwealth v. Ingersoll*, note that "It is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession." If, therefore, the court, in the proper exercise of its authority, should have passed sentence immediately upon the entry of the plea, it certainly is not erroneous and cannot have been harmful to have entered a "find-

ing" of guilty after the entry of the plea and prior to the sentence.

In this connection, it is to be borne in mind that the defect, if any, in the sentence is one of form merely, and not of substance, and, consequently, we must have reference to section 1025, Revised Statutes, which provides:

"Nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

It certainly cannot be argued that the court, by the interjection of the harmless statement that he "finds the defendant guilty," can have possibly prejudiced the plaintiff in error in the slightest degree, and therefore this court will not consider this alleged error of the trial court. It is at most harmless, if indeed, it be error at all.

CASES CITED BY PLAINTIFF IN ERROR.

The chief authorities upon which the argument of counsel for plaintiff in error is based are Chitty and Hawkins, and elaborate quotations are made from these authors, running both to the question of pleas in general and the plea of *nolo contendere* in particular. If, however, the quotations be examined carefully, it will be noted that they state no other or different rule from that laid down in all of the adjudicated American cases, and, in fact, the American cases are entirely, or largely, built upon the idea conveyed by Hawkins and Chitty respecting this plea. The Supreme Court of New Hampshire has

made a very careful review of the early English and American authorities upon the plea of *nolo contendere*, and, after quoting from Chitty, Hawkins, and other English and American authorities, this statement is made in the opinion of the court:

"There is no evidence that any meaning is now attached to the entries 'guilty,' or that the defendant 'will not contend with the state,' differing from those described by Hawkins and Chitty. Modern cases attach the same meaning. *Commonwealth v. Horton*, 9 Pick., 206. The plea 'is an implied confession of guilt only and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea as well as upon a plea of guilty.'"

State v. La Rose, 71 N. H., 435, 439.

It will thus be seen that courts of the highest respectability, in going to the source of information alleged by counsel to sustain his theory, have put an entirely different construction upon the deductions gleaned by Hawkins and Chitty, and the other writers from their experience at the English common law.

Another point which counsel makes with great strenuousness is that no common law authority can be found where *nolo contendere* was accepted in a felony case, and where the sentence was more than a fine. As we have heretofore suggested, and now again remind the court, this statement is disproved by a reading of the opinion in *Commonwealth v. Holstine*, 132 Penna. State, 357, and *State ex rel v. Judges of Quarter Sessions*, 46 N. J. Law, 112, and *U. S. v. Wright*, *supra*. In all of these cases, the

sentence of the court upon the plea was a fine and imprisonment; in two of the cases, the latter, the imprisonment being based upon a felony case, and imprisonment fixed at a term in the penitentiary. And both Pennsylvania and New Jersey are common law states.

WAIVER AND STANDING MUTE.

Another point raised in the brief is that plaintiff in error in this case stood mute, and that a plea of not guilty should have been entered by the court. It hardly seems necessary to answer this argument, its absurdity is so palpable, for the record shows that plaintiff in error, upon his own motion and by his attorney, asked the court for leave to withdraw a plea of not guilty which had already been entered, and to substitute therefor the plea of "*nolo contendere*." Certainly, plaintiff in error did not "stand mute," with the record speaking as it does. He did not "stand mute." He did not answer "foreign to the purpose." He entered a plea acknowledging his guilt.

Nor did the plaintiff in error "waive" any substantial rights as to arraignment and plea, or any rights and privileges conferred by law on him, as argued by counsel. Counsel cites the Crain case, 162 U. S., as authority for the proposition that, in this case, plaintiff in error waived some substantial right, but a reading of the Crain case shows the distinction between the two propositions, for in that case the record failed absolutely to disclose that the defendant had ever been called upon or given an

opportunity to enter a plea of any kind or description prior to sentence. It is submitted that that is quite different from the case at bar, where plaintiff in error was arraigned twice and entered pleas two distinct and different times.

The sentence in the case at bar is not excessive. The sentence imposed was not in excess of the amount fixed by the statute under which the indictment was brought, and the court has not abused its discretion in fixing the punishment in this case at two years' imprisonment in addition to the fine imposed. The court very carefully listened to all of the evidence which plaintiff in error cared to offer, including his own statements under oath upon the witness stand. It did not enter the judgment immediately upon the entry of the plea, but continued the case, as the record will show, from week to week, in order to give plaintiff in error an opportunity to show matters and things which might mitigate the punishment possible to inflict against him. He had due process of law.

It is therefore respectfully contended that the plea entered in this case was a proper one to be entered under the circumstances; that the judgment entered upon the plea was a proper one and should be affirmed.

Respectfully submitted,

JAMES H. WILKERSON,
United States Attorney,

HARRY A. PARKIN,
Assistant U. S. Attorney,

Attorneys for Defendant in Error.

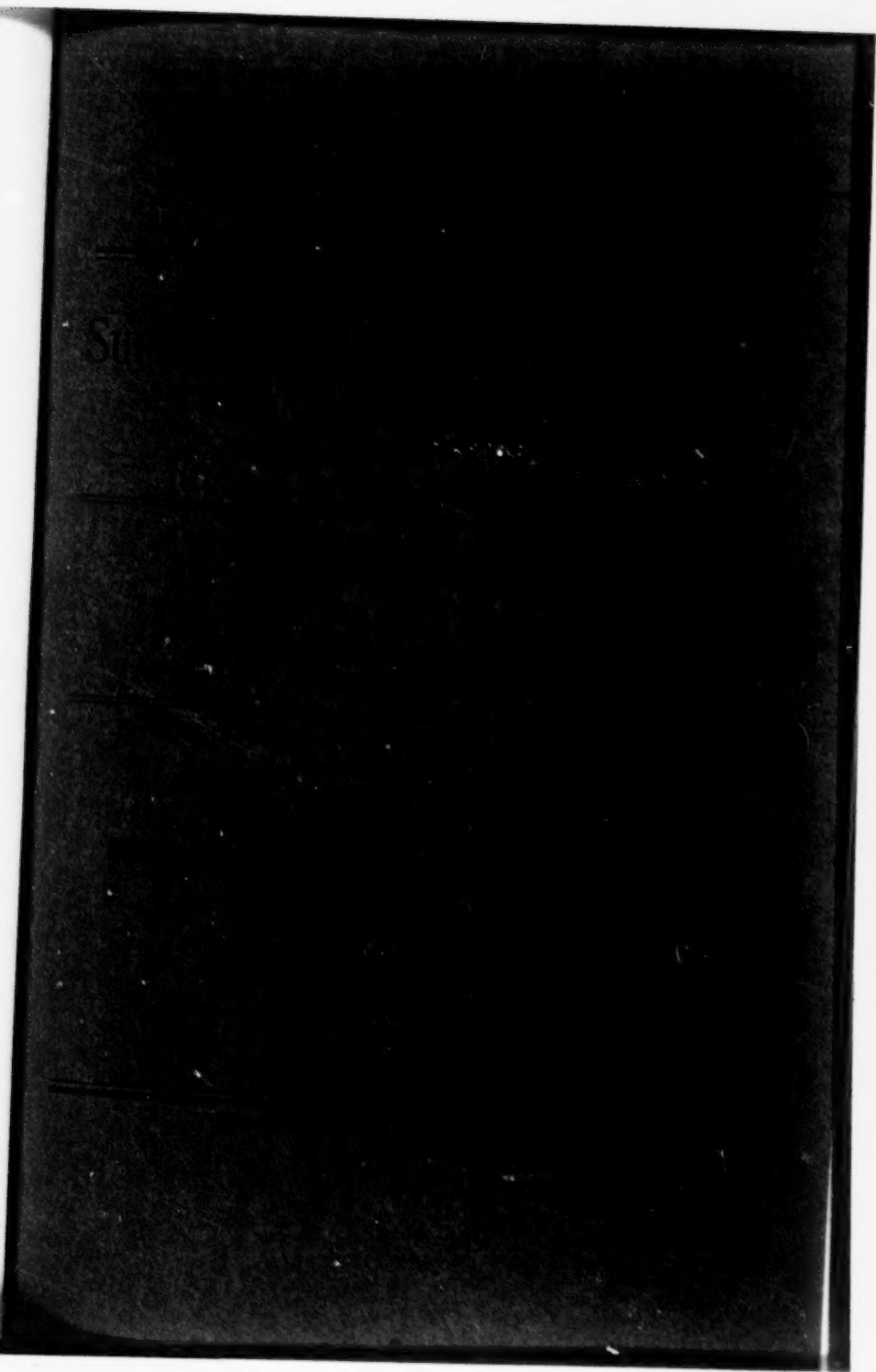
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

I, EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 20 (Brief for Plaintiff in Error), and from 1 to 24 (Brief for Defendant in Error), inclusive, contain a true copy of the brief and argument for plaintiff in error, filed herein June 5, 1911; also a true copy of the brief for defendant in error, filed herein September 18, 1911, in the case of *David Shapiro v. United States of America*, No. 1777, October Term, 1910, as the same remain upon the files and record of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony whereof I hereunto
subscribe my name and affix the
seal of said United States Circuit
Court of Appeals for the Seventh
Circuit, at the City of Chicago,
this nineteenth day of November,
A. D. 1914.

(SEAL)

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*



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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 93

DAVID SHAPIRO,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Error to the District Court of the United States for the
Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

PREFATORY.

As a preliminary to the statement of the case, we desire to note that the jurisdiction of this court to review the judgment of the District Court of the United States in this case, is based upon the several pleas of former jeopardy filed and acted upon adversely to the defendant in the court below, claiming immunity and privileges granted by the fifth amendment to the Constitution of the United States.

Section 238 of the Judiciary Code.

Bohannon v. Nebraska, 118 U. S., 238.

Ex p. Nielson, 131 U. S., 176.

Kepner v. U. S., 195 U. S., 100.

STATEMENT.

May it please the Court:

The plaintiff in error, David Shapiro, referred to in this statement as defendant, was indicted in the District Court for the Northern District of Illinois, on June 21, 1910, charged with the violation of the Internal Revenue Laws of the United States. The indictment contained thirteen (13) counts. (Trans., 2.) The first four counts charged a violation of Section 3286 of the Revised Statutes; Counts 5, 6, 7 and 8, a violation of Section 3317; Count 9, a violation of Section 3318; Count 11, a violation of Section 3326, and Count 12, a violation of Section 3324, all felonies.

Count 10 charged a violation of the Act of July 16, 1892, Chapter 196 (27 Stat. L., 200), which provides no penalty for its violation, the penalty therefor being governed by Section 3456 of the Revised Statutes *imposing a fine only*. The numbers of the various sections of the statutes upon which the prosecution is based are endorsed upon the back of the indictment, under the signature of the Foreman of the Grand Jury. (Trans., 7.)

Count 13 charges a violation of Section 3455 of the Revised Statutes, which is punishable by fine only, if committed without intent to defraud the revenue, and by fine and imprisonment if committed with such intent.

Defendant, on June 24, 1910, pleaded *not guilty* to said indictment. (Trans., 7.)

On January 3, 1911, he appeared and in the presence of the United States Attorney "by leave of court first had and obtained, said defendant withdraws his plea of not guilty heretofore entered herein, and being now arraigned upon the indictment filed herein against him, pleads *nolo contendere* thereto." (Trans., 9.)

On January 20, 1911, after the acceptance of the plea of *nolo contendere*, the United States Attorney, by leave of court entered a *nolle prosequi*, as to all counts except the fourth, ninth and twelfth, and it was thereupon ordered that the defendant be discharged from further prosecution under Counts 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13, leaving in the record only three counts, each of which charged a felony. (Trans., 10.)

The record further recites that afterwards on the same day, "This cause coming on to be heard on defendant's plea of *nolo contendere* heretofore entered herein, come the parties by their attorneys and the defendant in his own proper person, and the hearing proceeds, and the court having heard the evidence, * * * takes the cause under advisement. (Trans., 10.)

On January 23, 1911, judgment was entered by Judge Landis finding the defendant guilty and sentencing him to imprisonment in the penitentiary at Fort Leavenworth, Kansas, for two (2) years and to pay a fine of Ten Thousand Dollars. (Trans., 11.)

Thereupon a writ of error was sued out by the defendant from the Circuit Court of Appeals for the Seventh Circuit to reverse said judgment and on

January 2, 1912, an order was entered therein reversing the judgment on the ground that under the plea of *nolo contendere*, defendant could not lawfully be sentenced to imprisonment—the maximum penalty permissible under such plea being a fine only. The cause was thereupon remanded with directions either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and *proceed further in conformity with law*. The opinion of the Court of Appeals in full is as follows:

(Before Baker, Seaman and Kohlsaat, Circuit Judges.)

"*Per Curiam*: The judgment from which this writ of error is brought pronounces, upon a finding of guilty as charged in the indictment, that the plaintiff in error be imprisoned in a penitentiary for two years and pay a fine of \$10,000 besides the costs, under an indictment charging in several counts various violations of the internal revenue statutes, with a plea of *nolo contendere* tendered as the only plea thereunder. The errors assigned are identical with those assigned in *Tucker v. United States* (No. 1776), decided herewith (196 Fed., 260), and no distinction from the indictment and record of proceedings there presented and considered appears in the present case, in so far as material for decision. So the opinion and ruling therein is applicable to this writ, and the judgment of the District Court is reversed, accordingly, and the cause is remanded, with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed further in conformity with law." (Italics ours.)

It appears from the *Tucker* case (196 Fed., 260), referred to in the above *per curiam* opinion, that the Court of Appeals held that under the indictment in

this case, under certain counts, it was proper to take the plea of *nolo contendere*; that the taking of such plea amounted to an election on the part of the District Attorney to stand on the misdemeanor counts only. (See Point 3, 196 Fed., 267.) But inasmuch as it did not appear affirmatively from the record that the plea of *nolo contendere* had been accepted by the District Court, and as the evidence referred to in the record had not been preserved, the Court of Appeals reversed the judgment with directions either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed in accordance with law.

On February 15, 1912, the mandate of the Court of Appeals was filed. The defendant presented a petition for change of venue on the ground of prejudice of the Hon. K. M. Landis, Judge, which was refused. "Thereupon the District Attorney moved the court to reject the plea of *nolo contendere* heretofore entered in said cause which motion was *resisted* by counsel for the defendant. * * * Thereupon the court directed that an order be entered rejecting said plea of *nolo contendere* and ruling said defendant to plead. Thereupon the court directed the Clerk to enter a plea of not guilty for the defendant, to which ruling of the court the defendant then and there duly excepted." (See first Bill of Exceptions, Trans., 16, and see court order to same effect, Trans., 11-12.)

Thereafter, by leave of court, defendant filed three verified special pleas. The first plea filed on the 15th day of March, 1912 (Trans., 17), recites the facts above referred to as to the withdrawal of the

original plea of not guilty by leave of the United States District Court, that by leave of Court and with the consent of the United States Attorney, defendant pleaded *nolo contendere*, and "That the said plea of *nolo contendere* was then and there duly accepted by the said District Court"; that thereafter the District Attorney entered a *nolle prosequi* as to counts 1, 2, 3, 5, 6, 7, 8, 10, 11 and 13, and that thereupon the cause came on to be heard upon said plea of *nolo contendere* and later came on for sentence upon said plea, and defendant was sentenced to the penitentiary as above set forth; that said judgment was reversed; that "while it is true that some ambiguity exists in the record * * * as written up by the Clerk * * * whether the said plea of *nolo contendere* pleaded by this defendant was accepted by the court, nevertheless, in truth and in fact, the said District Court did accept the said plea of *nolo contendere*, and acting under and upon said plea, heard evidence solely for the purpose of fixing the punishment to be imposed upon him, this defendant, and any recital in the record to the contrary or ambiguously stated is merely a misprision of the Clerk of the court, for which this defendant cannot in any way be held responsible." (Trans., 19.) The plea then recites the subsequent proceedings and claims that by reason thereof, defendant had once been in jeopardy and cannot again be placed on trial upon said indictment. In said plea the defendant specially pleaded and invoked the protection of the Fifth Amendment to the Constitution of the United States, providing—"Nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb." (Trans., 19.)

The second special plea alleged that the defendant, in September and December, 1910, tendered to the Commissioner of Internal Revenue, the sum of five thousand dollars (\$5,000) in full satisfaction and settlement of all civil and criminal liability for the offenses charged in the indictment; that the Commissioner accepted said amount and deposited same in the United States Treasury; that on December 13, 1910, he and others against whom indictments were pending deposited twenty-seven thousand dollars (\$27,900) (which included said \$5,000) with said Commissioner; that said Commissioner accepted said sum in full settlement and satisfaction of any and all claims whether civil or criminal against defendant, and that the Commissioner deposited same in the Treasury of the United States. (Trans., 21-2.)

The third special plea filed by leave of court on May 10, 1912 (Trans., 23), alleges the same proceedings set up in the first plea of former jeopardy leading up to the original judgment and then recites that a writ of error was sued out as above set forth, which was on February 3, 1911, made a supersedeas; that on May 2, 1911, the order of supersedeas was modified to authorize the United States to enforce the collection of the judgment so far as the fine of ten thousand dollars (\$10,000) was concerned; that execution was issued thereon and garnishment proceedings were commenced against several banks and against the Assistant Treasurer of the United States at Chicago; that upon a hearing upon the answer of one of the garnishees, it appeared that a draft on the said Treasurer of the United States for five

thousand dollars (\$5,000) payable to defendant, was in possession of the Collector of Internal Revenue at Chicago, and said proceedings were dismissed as to said garnishee; that said five thousand dollars (\$5,000) was never returned to the defendant, and was in the hands of the United States and its authorized officials. Wherefore defendant alleges the judgment against him as to the fine (which was the only valid part of the judgment) has been partly executed and that he has once been in jeopardy. (Trans., 23-27.) The defendant in this plea also claims the protection of the Fifth Amendment to the Constitution of the United States. (Trans., 27.)

General demurrers were interposed by the Government to each of said special pleas (Trans., 35, 36, 37), which demurrers and each of them were sustained by the District Court and exceptions to said ruling were duly taken by the defendant. (See second Bill of Exceptions, Trans., 35.)

The defendant Shapiro was thereupon placed upon trial before a jury, over his objection (Trans., 45), and notwithstanding the demurrers confessing the pleas, the defendant offered to introduce evidence in support of his respective pleas of former jeopardy, which evidence was rejected by the District Court on the ground that the facts set forth in the pleas were admitted by the demurrers and that, therefore, it was not necessary for the defendant to introduce evidence in support of same. (Trans., 45.)

Thereupon the Government introduced evidence in support of the indictment and the defendant introduced none. The defendant moved for a direction

to the jury to find him not guilty, which was overruled and exception taken. (Trans., 112.) The defendant was found guilty by the jury and was sentenced on the verdict to imprisonment in the penitentiary for two (2) years and to pay a fine of five thousand dollars (\$5,000), to reverse which judgment this writ of error was sued out.

SPECIFICATION OF ERRORS.

I.

The District Court erred in setting aside the defendant's plea of *nolo contendere* and in entering a plea of not guilty for him against his protest. (Assign. of Errors No. 2, Trans., 40.)

II.

The District Court erred in sustaining the demurrer of the United States to the plea of plaintiff in error alleging former jeopardy filed on the 15th of March, 1914, the defendant having been in jeopardy the moment the plea of *nolo contendere* was entered by leave of court. (Assign. of Errors No. 4, Trans., 40.)

III.

The District Court erred in sustaining the demurrer of the United States to defendant's plea filed on the 10th day of May, 1912, alleging former jeopardy by reason of the satisfaction in part of the original judgment against him. (Assign. of Errors No. 2, Trans., 40.)

IV.

The District Court erred in sustaining the demurrer of the United States to defendant's plea that criminal liability for the acts charged had been compromised with the Commissioner of Internal Revenue. (Assign. of Errors No. 5, Trans., 40.)

V.

The District Court erred in not holding the facts alleged in said pleas to be a bar to the further prosecution of defendant under the indictment herein. (Assign. of Errors No. 6, Trans., 40.)

VI.

The District Court erred in not holding that defendant was entitled to his liberty under the Fifth Amendment to the Constitution or that, at most, he was subject to a small fine. (Assign. of Errors No. 7.)

VII.

The District Court erred in denying the defendant's motion in arrest of judgment and in entering judgment on the verdict of the jury sentencing the defendant to the penitentiary for two years and to pay a fine of five thousand dollars. (Assign. of Errors Nos. 9 and 11, Trans., 40.)

POINTS.

1.

Plaintiff in error has been once in jeopardy since he stood convicted upon his plea of *nolo contendere* and sentence was imposed thereunder. The only error in the record after the entry of the plea of *nolo contendere* was in the imposition of sentence of imprisonment. A lawful sentence should have been imposed upon remandment of the cause. The placing of the defendant on trial before a jury a second time was in violation of the **Fifth Amendment** to the **Constitution of the United States**.

2.

Acceptance of plea of *nolo contendere* is admitted by the demurrers to the pleas of former jeopardy, although the mere entry of the plea by leave of court and the withdrawal of the plea of not guilty and the sentence thereunder are equivalent to an acceptance of said plea.

3.

If the District Court made a mistake in taking the plea of *nolo contendere*, such mistake was one of law, based upon no misapprehension or misunderstanding of the facts and was not made by the defendant.

4.

The cause has been compromised by the **Commissioner of Internal Revenue**.

5.

Under all the authorities, the entry of the plea of nolo contendere was in the nature of a compromise.

6.

At the time of judgment there was, by the action of the District Attorney in nolle prosequing the misdemeanor counts (the only counts applicable to the plea of nolo contendere), no count in the indictment upon which the court could proceed.

BRIEF OF ARGUMENT.

NOTE: The various assignments of errors relating to the setting aside of the defendant's plea of *nolo contendere*, the sustaining of the demurrers to the defendant's pleas of former jeopardy, the overruling of the defendant's motion in arrest of judgment, the placing of the defendant on trial a second time before a jury and entering judgment on the verdict, etc., having a close relationship to each other, will for the sake of brevity and convenience be treated here together, while the assignment of error relating to the sustaining of the demurrer to the plea of compromise with the Commissioner of Internal Revenue will be treated separately.

I.

The mere entry of the plea of *nolo contendere*, by leave of court, placed the defendant in jeopardy because the defendant was liable to an immediate sentence, and he was so sentenced. Therefore it was not within the power of the trial court against the defendant's objection to set aside said plea and retry the case before a jury, and the action of the court in doing so was in direct violation of the Fifth Amendment to the Constitution of the United States; moreover it is insisted that the plea of *nolo contendere* was in fact accepted by the court.

In *Ex Parte Lang*, 18 Wall., 163, it was said:

"The common law not only prohibited a second punishment for the same offense, but went

further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

The above extract was distinctly approved in *Kepler v. U. S.*, 195 U. S., 110-112. Tested by these principles, what are the facts here?

Although the record before the Court of Appeals may have been ambiguous, there can be no question that, as a matter of fact, the plea of *nolo contendere* was duly accepted by the District Court and that the original judgment was based upon that plea. It clearly appears from the recitals in the record (Trans., 9) that the defendant, by leave of court, withdrew his plea of not guilty and entered the plea of *nolo contendere*, and further, that the cause came later on to be heard on defendant's plea of *nolo contendere*. The two orders are as follows:

First order:

"And afterwards, to-wit, on the 3rd day of January, A. D. 1911, the following order was had and entered of record in said cause, to-wit:

"4451. THE UNITED STATES vs. DAVID SHAPIRO. Comes the United States by Edwin W. Sims, Esq., United States Attorney, comes also the defendant herein by his attorney and in his own proper person and by leave of court first had and obtained said defendant withdraws his plea of not guilty heretofore entered herein, and being now arraigned upon the indictment filed herein against him pleads *nolo contendere* thereto, whereupon it is ordered by the court that this cause be continued until January 17, 1911." (Trans., 9.)

The second order is as follows:

"And afterwards, to-wit, on the 20th day of January, A. D. 1911, the following order was had and entered of record, in said cause, to-wit:

"4451. THE UNITED STATES VS. DAVID SHAPIRO. This cause coming on to be heard on defendant's plea of *nolo contendere heretofore entered herein*, come the parties by their attorneys and the defendant in his own proper person and the hearing proceeds, and the court having heard the evidence by the parties adduced and statements of counsel, and now being sufficiently advised in the premises, takes the cause under advisement." (Trans., 10.)

The nature of the plea of *nolo contendere*, according to the decision of the Court of Appeals in the Tucker case (196 Fed., 262), is as follows:

"The plea is in the nature of a compromise between the State and the defendant," and "it was within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission." (Italics ours.)

Further defining the nature of the plea of *nolo contendere*, the court said:

"It is not a plea, in the strict sense of that term in the criminal law, but a formal declaration by the accused, that 'he will not contend with the' prosecuting authority under the charge. When accepted by the court, it becomes an implied confession of guilt, and, for the purposes of the case only, equivalent to a plea of guilty, but distinguishable from such plea, in that it cannot be used against the defendant as an admission in any civil suit for the same act."

Mr. Colby, in his work on Criminal Law, Vol. 1, p. 287, speaking of this plea, says:

"Bishop says that the plea of *nolo contendere*, as it is usually called, is not common; but it is sometimes in *misdemeanors* allowed, partly by way of *compromise* between the prosecuting officer and the defendant. It differs but slightly in its effect from the plea of *not guilty*.

"Hawkins states it to be an implied confession, where the defendant in a case not capital doth not directly own himself guilty, *but in a manner admits it by yielding to the king's mercy*, and desiring to submit to a *small fine*."

We beg to refer at this time to the case similar in import to *State v. La Rose*, 71 New Hampshire, 435, holding that the plea of *nolo contendere* is based upon the theory of compromise and that the entering of such plea by a defendant and the imposing of sentence thereupon amounts to a compromise and is of necessity binding and valid. We also respectfully refer to the case of *Doughty v. De Amoreel*, 22 Rhode Island, 158; 46 Atlantic, 838, wherein, after discussing the nature of such plea, the following language is used:

"An accused person might find himself without witnesses to establish his innocence, from their death, absence, or other cause, and hence waive a fruitless contest."

The record here shows that judgment was there after entered. (Trans., 11.) It is respectfully submitted that the action of the court in permitting the withdrawal of the plea of not guilty and the substitution for it of the plea of *nolo contendere*, was, in and of itself, tantamount to an acceptance of the

plea. The defendant was liable to an immediate sentence and jeopardy therefore at once attached. The acceptance of the plea will be the more presumed in this case because the defendant having entered a plea of not guilty, was not entitled, as a matter of right, to retract it and plead anew without permission of the court.

1 Chitty Crim. Law, 436.

Comm. v. Blake, 12 Allen, 188.

Comm. v. Lannan, 13 Allen, 563.

That permission was duly granted by the court. (Trans., 9.) This presumption is still greater in the case at bar because the very plea of *nolo contendere* is in the nature of a compromise and was made by the defendant for the very purpose of avoiding a sentence of imprisonment.

The plea of former jeopardy filed by the defendant avers that Judge Landis heard evidence for the only purpose of fixing the punishment. This fact is admitted by the demurrer. (Trans., 19.) This court will not assume that Judge Landis sentenced a man on a felony case without a plea, upon his own finding of guilty and without a trial by jury. Such an assumption would be violative of the plain dictates of reason, and we trust that this court will, instead, assume that all the parties acted according to trend of natural consequences; that the plea of *nolo contendere* was entered for the purpose for which it was intended, and that it was so acted upon by the court.

The defendant Shapiro threw himself upon the mercy of the court. Necessarily by so doing, he

expected and was entitled to a less severe punishment than if he had been found guilty after a trial by jury. He, however, received no mercy and the maximum sentence was imposed. But the Fifth Amendment to the Constitution of the United States and the common law, over us all, at all times in these precincts, save as changed by statute, is not thus to be thwarted. So far as the action of human agencies was necessary to place the defendant in position to receive mercy, the necessary acts had been performed. If the presiding Judge of the District Court did not wish to administer mercy to the defendant, he should not have permitted him to withdraw his plea of guilty and enter the plea of *nolo contendere*. Having permitted him to withdraw his pleas of not guilty and to plead *nolo contendere*, and having thus placed the defendant in peril of an immediate sentence, there is no escape from the legal consequences of such action. Here there was a plea entered by leave of court. It amounted to a plea of guilty. Judgment could have been entered on the plea and it was so entered. But why speculate about it? All doubt is dispelled by the sworn plea of former jeopardy filed by the defendant, the truth of which is duly admitted by the demurrer of the United States. This plea alleges *that the plea of nolo contendere was, as a matter of fact, duly accepted by the court; that the defendant Shapiro was sentenced upon said plea, and that such evidence as was heard by the court, was heard under said plea for the purpose of fixing the penalty only.* (See Pleas, Trans., 17-20.)

The plea of former jeopardy filed by the defend

ant does not dispute the truth of any fact recited in the record. There is no statement anywhere in the record that the plea of *nolo contendere* was not accepted. Therefore the plea of former jeopardy does not attempt to contradict the record. It merely explains the transaction, if any ambiguity exists therein. Had issue been joined on the plea it would have been competent for the defendant to resort to oral testimony to show what has transpired and to identify the subject matter of the former conviction, and such practice is not infrequently resorted to.

Bartel v. U. S., 227 U. S., 433.

As the record now stands before this court, it leaves the question of acceptance of the pleas of *nolo contendere* in no doubt. It has been held that the fact that a defendant has pleaded *nolo contendere* presupposes that he had obtained leave of court to enter such plea.

State v. Henson, 66 N. J. L., 601, 609.

But here the record affirmatively shows that by leave of court the plea of not guilty was withdrawn and in its place *nolo contendere* entered, and that all of this was done in the presence of the United States Attorney. (Trans., 9.) And this was followed up by a judgment. What more can be desired?

The plea of *nolo contendere* in the case at bar was authorized and proper. The Court of Appeals so held. It is true that there were certain counts of the indictment to which the plea of *nolo contendere* was inapplicable under the ruling of the Circuit Court of Appeals, because some of the counts were

under statutes requiring imprisonment to be imposed; but there were in the indictment counts to which the plea was applicable, and, therefore, it could properly be accepted as a compromise of the whole case, and this position is fully sustained by the opinion of the Court of Appeals. Under the tenth count the court could have imposed only a fine. Under the thirteenth count the court could have imposed either a fine or imprisonment, depending upon whether the act charged was done with intent to defraud the United States of revenue.

The question of former jeopardy, of course, was not at issue before the Court of Appeals. The mandate of that court did not direct a new trial. It remanded the case to the District Court with directions "to accept or refuse acceptance of the plea of *nolo contendere* as tendered and proceed further in conformity with law." In view of the facts set forth in the special pleas filed after the mandate had been filed, the only proceeding that would have been "in conformity with law" was the correction of the illegal sentence of imprisonment theretofore pronounced and the imposition of a lawful sentence against the defendant, viz.: a fine only.

In Re Bonner, 151 U. S., 242, 262.

Ballew v. U. S., 160 U. S., 187.

Hanley v. U. S., 123 Fed., 849.

This not having been done, the defendant is entitled to his discharge on his plea of former jeopardy. At any rate that part of the judgment which relates to imprisonment cannot stand.

In *Shepherd v. The People*, 25 New York, 406, 418, 419, it was ruled (quotation from syllabus):

"A prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction cannot be subjected to another trial.

"The plea of *autrefois convict* is supported by proof of a lawful trial and verdict on a sufficient indictment, though no judgment be given upon it.

"Accordingly, when the judgment is reversed for an illegal sentence upon a conviction in which there was no error, a new trial cannot be ordered, but the prisoner must be discharged and this though upon a motion in arrest of judgment or motion for a new trial."

The doctrine of this case has been modified by statute in many jurisdictions, but such is the common law and we desire to call the attention of this court upon this point to the following cases:

The King v. Bourne, 7 Adolphus & Ellis, 58.

The King v. Ellis, 5 Barnewall & Cresswell, 395.

Shepherd v. Commonwealth, 2 Metcalf, 419.

II.

The setting aside of the defendant's plea of *nolo contendere* and placing him on trial before a jury was a clear violation of the **Fifth Amendment** to the **Constitution of the United States**.

The defendant was in jeopardy the instant he withdrew his plea of not guilty and, by leave of court, pleaded *nolo contendere*. The plea of *nolo contendere* took the place of a jury verdict. No trial was necessary and the only office of the court, after the entry of the plea, was to fix the sentence.

In *People v. Goldstein*, 32 Cal., 432, at page 433, it is said:

"Where a defendant pleads guilty, and his plea is entered of record as provided in the Criminal Practice Act, he stands convicted in the eye of the law as fully as *he would have been by a verdict of guilty*. He is convicted by his plea, and there is, therefore, no occasion for a trial, and nothing remains to be done except to pronounce judgment. *On the question of former conviction there can be no distinction between a plea and a verdict of guilty, for both are followed by the same consequences.*

"Nor is it necessary that a judgment should have been pronounced upon the conviction to make the plea of former conviction good. (1 Bishop on Criminal Procedure, Sec. 581; *The State v. Elden*, 41 Maine, 165.)"

In *Boswell v. The State*, 111 Indiana Rep., 47, at pages 48-49, Mr. Justice Mitchell, said:

"True, the language found in the books usually is, that jeopardy does not attach unless a jury has been actually empanelled and charged with the offence, but surely this can not mean that a court, without the intervention of a jury, may proceed so far that nothing remains to be done except to assess the amount of punishment, and that the defendant will not have been thereby put in jeopardy. *Trial by jury may be waived, or by pleading guilty the necessity for a trial may be wholly avoided, there being in that case no issue to try.* Necessarily, therefore, where a defendant is arraigned before a court having competent jurisdiction to hear and determine the charge, and to adjudge the punishment affixed to the offence, and pleads guilty, nothing further remains except to enter the plea and assess the punishment."

In *White v. Creamer*, 175 Mass., 567, the court, at page 568, said:

"We do not doubt that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered."

In *Kepner v. United States*, 195 U. S., 101, it was held (we quote from syllabus, page 101):

"At common law protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense; and it is the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, *although no judgment be entered on the verdict*, and it was found upon a defective indictment. **The second jeopardy is not against the peril of second judgment, but against being again tried for the same offense.**"

The court will notice from the quotation from the *White* case (175 Mass., 567) that the rule thus formulated is *not based upon the acceptance* of the plea of *nolo contendere*, but upon the fact that sentence was imposed after such a plea had been entered. Whatever doubt there may be in the minds of this court as to whether or not it is necessary to show in the record in express terms a formal acceptance of the pleas, *such requirement is not necessary to show a conviction*. In other words, it need not appear that the court accepted the plea—it amounts to a conviction if the court sentenced the defendant after such a plea has been entered.

We desire also to call the court's attention to the well considered case of *Buck v. Commonwealth*, 107 Pennsylvania State, 486, and to the following quoted from the opinion of the court (page 489):

"A defendant who is sentenced upon such a plea to pay a fine is convicted of the offense for which he was indicted."

1 Wharton Criminal Pleading and Practice, Section 418.

III.

There being no error in the record, except in the sentence and judgment of the court, defendant did not waive his right to claim jeopardy by suing out the writ of error from the **Circuit Court of Appeals**.

It may be admitted that where there is error in the proceedings leading up to the point where jeopardy attaches, a reversal of the judgment therefor, upon the application of the defendant destroys such jeopardy. In this case there was no such error. The only error was in the sentence. Moreover, the Court of Appeals did not direct a new trial. It did not set aside the defendant's plea of *nolo contendere*. It directed the court below to proceed in accordance with law. The Court of Appeals by its decision did not and could not destroy the defendant's privilege under the Constitution of the United States.

Jeopardy attached the moment the plea of *nolo contendere* was entered by leave of court, and the only error in the record occurred in the entry of the judgment which was subsequent to the taking of the plea. In this case there was no error up to and including the time the plea was entered. The Government surely cannot contend that because a defendant in a criminal case endeavors and succeeds in setting aside an unlawful and *excessive* sentence against him he thereby waived his right to claim former jeopardy and can be subjected to another trial.

The precise point of waiver was raised and decided adversely to the Government's position in several jurisdictions. In *State v. Parish and Nicols*, 43 Wis., 395, the court said:

"But it is claimed by the learned attorney general that the defendants were not in jeopardy because the judgment was arrested and that it is quite immaterial whether it was properly or improperly arrested. If this position is well taken it is so because either (1) the motion in arrest operates as a waiver of the jeopardy or (2) the order arresting judgment is conclusive of the proposition that the record was insufficient to support the verdict.

"We think the motion is not a waiver of the right to plead the former jeopardy. *The order arresting judgment does not set aside the verdict.* That remains a part of the record, and we see no good reason why the defendants may not be heard to allege at all times that such record shows they were in jeopardy of punishment for the offense charged in the information. If any case holds the contrary we are not willing to follow it. Had the *verdict* been set aside on motion of the defendants there is no doubt of the power of the court to order another trial on the same information; *but the distinction between setting aside a verdict and arresting a judgment leaving the verdict intact* is obvious. When a verdict of guilty in a criminal case is set aside all the proceedings on the trial are necessarily set aside and vacated with the verdict. So when the *verdict* is set aside on motion of the accused and he afterwards alleges that the trial and verdict put him in jeopardy of punishment it may well be replied that the portions of the record by which alone the jeopardy can be proved have been set aside and vacated at his request and that he has thereby deprived himself of the means of proving his allegation of jeopardy. But here no such

reply can be made, for, as already observed, the record of the trial *and verdict remains intact*.

"The district attorney, who argued this case with the attorney general, maintains that there must be a judgment on the verdict before the defendant can successfully plead *autrefois convict*. There may be some old cases which so hold, but we understand the rule to be well settled in this country to the contrary. A plea which shows that the defendant has once been in jeopardy for the same offense must necessarily be a good plea, and, by all of the authorities, if the indictment or information is sufficient and the proceedings regular, the jeopardy commences when the jury are impaneled and sworn and charged with the deliverance of the accused. This general rule is subject to certain exceptions, none of which are mentioned here. For the rule and exceptions see Cooley's Con. Lim., 326-8, and cases cited in the notes."

In the case of *Kepner v. United States*, 195 U. S., 100, at 135, Mr. Justice Holmes, in his dissenting opinion, speaking of a waiver of jeopardy, said:

"Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

The precise question of waiver arose and was decided in *Kring v. Missouri*, 107 U. S., 234, where Mr. Justice Miller says:

"Did he waive or annul this acquittal by prosecuting his writ of error. Certainly not by that act, for if the judgment of the lower court

sentencing him to twenty-five years imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquittal. *He refused to withdraw his plea of, guilty. It was stricken out by order of the court against his protest.* He refused then to plead, not guilty, and the court in like manner, against his protest, ordered a general plea of, not guilty, to be filed. He refused to go to trial on that plea, and the court forced him to trial."

And so in the case at bar, the plea of not guilty was entered by the court against the defendant's protest. He refused to plead further, and did not waive his right to insist that he had once been in jeopardy.

Defendant complained to the Circuit Court of Appeals that the sentence was excessive and unlawful; that under the plea of *nolo contendere* the sentence should have been limited to a fine only, and the Court of Appeals sustained him in his contention. He was in jeopardy from the moment his plea was entered, because the court had jurisdiction, the indictment was valid, and the plea of *nolo contendere* was regular and proper under the indictment. The test is whether a valid judgment could have been entered the moment his plea of *nolo contendere* had been entered. As was said in the case of *Ex parte Lange*, 18 Wall., 174:

"The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense on a valid verdict. The error of the court in imposing the two punish-

ments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void."

DISTINCTION BETWEEN SETTING ASIDE A VERDICT ON
DEFENDANT'S MOTION AND A REVERSAL FOR MERE
ERROR IN THE JUDGMENT.

There is no case to be found in the books where the reversing of an erroneous judgment imposed upon a regular conviction on a plea of guilty because of an excessive sentence has been held to be a waiver of the jeopardy thereby attaching. Cases of the setting aside of a *verdict* upon the defendant's application are readily distinguishable. The very fact of his guilt is disputed by the accused in such cases, and where the reviewing court grants a new trial at his request and he is again put on trial he cannot be heard to say that he is twice in jeopardy. *In this case the Court of Appeals did not grant or order a new trial. It merely set the judgment aside.* It did not have sufficient information whether the plea of *nolo contendere* was accepted by the court. This was supplied in the court below. What was done to create the second jeopardy was done by the District Court subsequent to the reversal. In this case the conviction, viz., the plea of *nolo contendere*, remained untouched by any action of the Court of Appeals or the accused, and he is now complaining of the action of the trial court in setting his plea aside subsequent to the reversal. Therefore no element of waiver arises by reason of the reversal of the judgment. If a waiver could thus be created a defendant would be compelled to stand the consequences of an erroneous sentence un-

der the peril of a greater punishment if he objects to an erroneous sentence imposed upon him.

We have examined the authorities bearing upon the proposition that the accused is estopped to plead a prior conviction where his conviction has been reversed for error on an appeal or writ of error brought by himself, although he has served a part of his term of imprisonment, and find that in all of them either the indictment was invalid or there was a defective information or the *verdict* was set aside on the motion of the accused, or there was some other fatal irregularity *short of any error in the judgment*, and in none of them was the judgment bipartite and the valid portion executed as it was in *ex parte Lange*, *supra*.

In *People v. Casborus*, 13 Johns. (N. Y.), 351, the indictment was invalid. This case is cited by the Supreme Court in *ex parte Lange*, 18 Wall., 163, to show that jeopardy can be waived by defendant's motion to set aside the *verdict* or for a new trial.

The *Lange* case points out the distinction:

"But there is a class of cases in which a second trial is had without violating this principle as when the jury fail to agree and no verdict is rendered (*U. S. v. Perez*, 6 Wheat., 579), or the *verdict* set aside on motion of the accused, or on a writ of error prosecuted by him (*People v. Casborus*, 13 Johns., 351), or the indictment was found to describe no offense known to the law."

THAT A WRIT OF ERROR TO CORRECT AN ERRONEOUS JUDGMENT OR SENTENCE WILL NOT HAVE THE EFFECT TO WAIVE A FORMER JEOPARDY IS CLEARLY ESTABLISHED IN MANY WELL REASONED DECISIONS OF COURTS OF RESPECTABLE AUTHORITY.

State v. Parish & Nichols, 43 Wis., 395.

State v. Norrell, 2 Yerg., 24.

Mount v. State, 14 Ohio, 295.

State v. Benham, 7 Conn., 414.

Kring v. Missouri, 107 U. S., 234.

Kepner v. United States, 195 U. S., 100.

Woodruff v. United States, 68 Fed., 538.

It is our contention that when the mandate of the Court of Appeals was filed, its direction to proceed further "in conformity with law" did not justify the District Court in setting aside the plea which had been regularly entered and placing the defendant on trial a second time before a jury, but authorized that court to correct the only error, which was in the sentence. If the court had proceeded to correct this error and had entered a proper judgment on the plea of *nolo contendere*, there would have been no error in this record. But the Judge of the District Court went further than this, and with full knowledge that the plea of *nolo contendere* was in fact accepted and acted upon attempted to set aside the proceedings *prior* to the sentence against the defendant's protest. This action of the court was clearly erroneous and in violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States.

IV.

The original judgment having been satisfied in part by the payment of half the fine, the court had no power to again try the accused or to impose a different or greater punishment by another sentence.

The Court of Appeals herein has held that in so far as the sentence imposed a fine upon the defendant, the original sentence herein was proper. There were two counts in the indictment, namely the tenth and thirteenth, to which *nolo contendere* was a proper plea. The fact that these counts, together with others, had been *nolled* by the District Attorney after the entry of the plea, cannot affect the situation, and the Circuit Court of Appeals, in holding that the plea was proper, did so with knowledge that the record disclosed the *nolle prosequing* of such counts.

The third special plea (Trans., 23) alleged that the original order making the writ of error sued out of the Circuit Court of Appeals a supersedeas, was modified to authorize the United States to enforce the collection of the fine imposed upon the defendant; that execution was issued and garnishment proceedings begun; that upon a hearing on said proceedings, the court found that a draft for five thousand dollars (\$5,000), payable to defendant, was in possession of the Collector of Internal Revenue at Chicago, and that same was retained by him in partial satisfaction of the fine.

The only valid part of the sentence, viz., the fine, was therefore partly executed.

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In *Ex parte Lange*, 18 Wall., 163, 176, the prisoner had been convicted in the Circuit Court under a statute which authorized the court to impose either a fine of not more than \$200, or imprisonment not to exceed one year. The court erroneously sentenced the prisoner to pay a fine of \$200 *and* to be imprisoned for one year. The defendant paid the fine. He then sought his release on *habeas corpus* before the same Judge. The court set the first sentence aside and sentenced him to imprisonment for one year.

In that case this court held (we quote from the head notes prepared by Mr. Justice Miller, 21 L. Ed., 872):

"If there is anything settled in the jurisprudence of England and America, it is that no man shall be twice punished by judicial judgment for the same offense. (Syll., 4.)

"The provisions of the common law and of the Federal Constitution, that no man shall be twice placed in jeopardy of life and limb, are mainly designed to prevent a second punishment for the same crime or misdemeanor. (Syll., 5.)

"Hence, when a court has imposed fine and imprisonment where the statute only conferred power to punish by fine **or** imprisonment, **and the fine has been paid**, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence. (Syll., 6.)

"The judgment of the court, having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at end." (Syll., 7.)

In *Ex parte Parks*, 93 U. S., 18, 23, Mr. Justice Bradley stated the ground of the judgment in the case of *Lange*:

"In *Ex parte Lange* we proceeded on the ground that when the court rendered its second judgment the case was out of its hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void."

In *Moss v. United States*, 23 App. D. C., 475, petitioner had been found guilty of contempt, for which the punishment provided by law was either fine or imprisonment, but not both. The fine and costs imposed by the court had been paid and the defendant sought to be released on a writ of *habeas corpus* from the imprisonment imposed upon him thus erroneously. The opinion by Chief Justice Alvey is in part as follows:

"It is, however, insisted, on the part of the appellant, that the sentence was not only erroneous but was absolutely void and without effect. This contention is certainly well founded as to that part of the sentence which imposed a period of imprisonment upon the appellant in addition to fine and costs. Either fine or imprisonment, in the discretion of the court, could be imposed, but not both. * * * In this case it is conceded that the fine and costs had been paid, and the amounts accepted on behalf of the United States; and, therefore, the sentence has been executed so far as it can be legally executed, and as to the imprisonment imposed the sentence is void. In *Ex parte Lang*, 18 Wall., 163, it was held that a judgment of a court that had been executed so far as to be in full satisfaction of one of the alternative

penalties of the law, put an end to the power of the court over the offense. Upon payment of the fine and costs the appellant was entitled to his discharge. After that it was unlawful to detain him. *Re Swan*, 150 U. S., 652. * * * Sentence, and order overruling demurrer, reversed and appellant discharged."

In *People ex rel. Tweed v. Liscomb*, 60 N. Y., 559, at page 560, it was held:

"So, also, if it appear that the judgment is in excess of that which by law the court has power to make, it is void for the excess and can be so declared; and it appearing further that the valid part of the judgment has been fully executed, the court or officer entertaining the writ has power to discharge the prisoner, and duty requires its exercise."

In *Sennott's case*, 146 Mass., 489, 493, Judge Knowlton said of the case of *Lange*:

"The leading cases of *Ex parte Lange* and *People v. Liscomb*, 60 N. Y., 559, do not decide that a sentence which is merely erroneous and excessive through a mistake of law is void, in such a sense as to make an officer liable for executing it, or to call for a discharge upon a *habeas corpus* of a person held under it. Indeed, in the former case, Mr. Justice Miller, in his opinion, at page 174, asserts it is not. *The principle upon which this case goes is, that when a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed in whole or in part, it has no jurisdiction to impose another, either in addition to, or in substitution for, the first. And the case of People v. Liscomb, rests on similar grounds.*"

In *Commonwealth v. Weymouth*, 84 Mass., 144, at page 147, Mr. Justice Bigelow said:

"He was never taken or charged on the warrant which was issued on the sentence as originally pronounced. That sentence never went into operation, and, in effect, was the same as if it had never been passed. So long as it remained unexecuted, it was, in contemplation of law, in the breast of the court, and subject to revision and alteration. He was not injured or put in jeopardy by it any further than he would have been by a conclusion or judgment of the court as to the extent of his punishment, which had not been announced. *Until something was done to carry the sentence into execution*, by subjecting the prisoner to the warrant in the hands of the officer, no right or privilege to which he was entitled was taken away or invaded, by revoking the sentence first pronounced, and substituting in its stead the one under which he now stands charged. If it had appeared that the petitioner had actually been taken and committed under the first sentence, or if he had been thereby condemned to imprisonment in the state prison, so that the term of his sentence would be computed from the time he was first ordered to remain in the custody of the sheriff, according to St. 1859, c. 248, we might have arrived at a different result; but on the record as it stands, we are all of opinion that the order must be, 'Prisoner remanded.'"

In *Brown v. Rice*, 57 Me., 55, at page 57, Mr. Justice Kent said:

"So in a criminal case, so long as the sentence remains *entirely unexecuted in any part*, and no execution of it has been attempted or made, it has been held that it might be revoked, and another sentence be substituted."

In *State v. Cannon*, 11 Ore., 312, at page 313, Mr. Justice Lord said:

"The question here is, could the court revise its judgment and increase the sentence imposed, although during the same term, after its original judgment had gone into effect? It is clear upon authority that this can not be done. Where a sentence had been passed upon a defendant and the judgment has gone into effect by commitment of the defendant under it, the court has done all it had the legal power to do under the proceedings in that case. (*Commonwealth v. Weymouth*, 2 Allen, 144; *Brown v. Rice*, 57 Me., 56; *The People v. Daffy*, 5 Barb., 205.)"

In *Whitney v. The State*, 6 Lea, 247, it is said:

"The error assigned is, that the court had rendered judgment in each of the cases at the trial term, and could not at a subsequent term change the judgment by increasing the punishment. If it be true that judgment was rendered at the trial term, then it was beyond the power of the court to change that judgment at the next term, or even at the same term, *if the judgment be executed*. (*Ex parte Lange*, 18 Wall., 163.)"

V.

At the time of the entry of the judgment against the defendant by Judge Carpenter on the second trial there was, in fact, no indictment upon which any valid judgment could be predicated.

The record shows that *after* the defendant's plea of *nolo contendere* had been entered by leave of court the District Attorney *nolle prossed* all the misdemeanor and some of the felony counts, leaving in the record counts numbers 4, 9 and 12, each charg-

ing a felony. (Trans., 10.) If the plea of *nolo contendere* amounts to a compromise, then by the entry of same by leave of court and consent of the United States Attorney the felony counts were abandoned by the United States when the plea of *nolo contendere* was taken. As heretofore pointed out, the *nolo pros* entered after the *nolo contendere* plea was taken could not, in any way, affect the rights of the defendant, because, at the time the plea of *nolo contendere* was entered there were misdemeanor counts in the indictment to which the plea of *nolo contendere* was applicable.

There was, therefore, in the record no indictment authorizing either Judge Landis or Judge Carpenter to impose any sentence. For this condition of the record the defendant cannot be held responsible.

Accordingly when the case was remanded to the District Court by the Court of Appeals there was no indictment authorizing Judge Carpenter to impose any sentence. By the *nolle prosequi* the District Attorney voluntarily struck from the indictment all the misdemeanor counts, leaving nothing to be done by the court either before the first judgment or after the remanding order was entered, except to discharge the defendant.

Mounts v. State, 14 Ohio Rep., 295.

State v. Elden, 41 Maine, 165.

V I.

The compromise with the Commissioner of Internal Revenue barred further prosecution of the defendant.

The second special plea of the defendant (Trans., 21) alleged that the defendant in September, 1910,

tendered to the Commissioner of Internal Revenue the sum of five thousand dollars (\$5,000) in full satisfaction and settlement of all criminal liability for the offense charged in the indictment; that the Commissioner accepted said amount and deposited it in the treasury of the United States. The compromise pleaded was effected under Section 3229 of the Revised Statutes providing as follows:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the Internal Revenue Laws instead of commencing suit thereon, and with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after the suit thereon has been commenced."

The statute places the authority and jurisdiction for making this compromise with the Commissioner. Under the ruling of the Attorney General the functions of the Secretary of the Treasury and the Attorney General are purely advisory.

12 Opinions, Atty. Gen., 472.

Having accepted the amount tendered and placed it in the Treasury of the United States, where it was out of his control and subject only to be returned under an act of Congress, the Commissioner has effectively compromised the defendant's liability and barred the further prosecution of the indictments. The fact that later the five thousand dollars was returned to the defendant (this being the five thousand dollars represented by the draft referred to in the third special plea (Trans., 25), which was

seized by the United States in satisfaction of defendant's fine) does not affect the situation, because if the compromise was actually effected as alleged in the plea, the prosecution was barred and the Government had no right to set aside the compromise on its own initiative and proceed with the prosecution.

In the case of *United States v. Chouteau*, 102 U. S., 603, which was an action upon a distiller's bond to recover for breaches of some of the statutes upon which the indictments in this case were based, the defendants pleaded that indictments had been returned against the principal for the same violations; that afterwards the Commissioner of Internal Revenue accepted one thousand dollars in full satisfaction, compromise and settlement of the indictment and prosecution, which were thereupon dismissed and abandoned, and that, therefore, suit on the bond was barred. The court says as to the effect of such compromise:

"Under the authority of an act of Congress a compromise with the Government was effected, by which a specific sum was paid by him, and received by the Government, 'in full satisfaction, compromise and settlement of said indictments and prosecutions,' which were accordingly dismissed and abandoned. That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offenses charged and any further punishment for them.

"The compromise pleaded must operate for the protection of the distiller against subsequent proceedings *as fully as a former conviction or acquittal*. He has been punished in the amount paid upon the settlement for the offense

with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the Government delusive and useless.

"Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The Government through its appropriate officers has indicated, under the authority of an Act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the Government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty."

See, also,

Wells v. Nickles, 104 U. S., 444.

It seems to us that good faith on the part of the prosecution would demand that the compromise entered into as alleged in this plea should be treated as a solemn contract and carried out in the spirit in which the statute was drawn.

Conclusion.

The plea of former jeopardy is a favored plea recognized by the Constitution of the United States. We have in this record a plea of *nolo contendere*, equivalent to a plea of guilty, entered by leave of the court. In the language of the Court of Appeals, quoting from *State v. LaRose*, 71 N. H., 435:

"The plea is in the nature of a *compromise* between the State and the defendant, *a matter not of right but of favor*, and an expression by the defendant of his desire to yield himself to the *mercy* of the court, and to submit to a *small fine*."

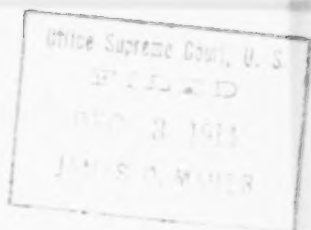
In addition to the *compromise implied by the plea itself*, there was the further express compromise entered into with the Commissioner of Internal Revenue. In disregard of both these compromises, and in disregard of the law, the court imposed an illegal sentence and actually executed that sentence in part as to the valid portion thereof, that is, as to the fine. Even leaving out of the question the effect of the plea of *nolo contendere*, it is apparent from the record that the plea of not guilty was withdrawn by defendant and the plea of *nolo contendere* entered with the expectation that he would be leniently dealt with. Instead of doing so, however, the trial court sought to punish him as severely as if he had been tried and convicted by a jury, and the Court of Appeals has refused to allow this judgment to stand. Having accepted the pleas of the defendant and having heard his testimony as to his guilt, such testimony being given, relying on the court to enter

proper sentence under the plea, it seems to us clear that the Government should endeavor to see that justice is done the defendant and that it should not seek to repudiate the compromises that were entered into with its representatives when the plea of *nolo contendere* was entered and when the Commissioner of Internal Revenue accepted the formal compromise offered by depositing the money in the United States Treasury. Defendant's rights, however, have been disregarded by the District Attorney and by the *trial court*. He has been placed upon trial against his protest after having once been in jeopardy and we can only look to this court to insist that the Government carry out its contracts in good faith which, in this instance, requires reversal of the judgment by the District Court and the discharge of the defendant, and this we most humbly pray.

Respectfully submitted,

ELIJAH N. ZOLINE,

Attorney for Plaintiff in Error.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.

No. 93.

DAVID SHAPIRO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF ON THE MERITS FOR PLAINTIFF IN
ERROR.

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MAY IT PLEASE THE COURT:

As to the jurisdiction of this court, we beg to refer to our brief in opposition to the motion to dismiss, on file in this court.

Since the filing of our brief on jurisdiction, etc., there have been filed in this court by plaintiff in error, in accordance with a stipulation, certified copies of the briefs of both parties filed in the United States Court of Appeals for

the Seventh Circuit *on the first writ of error*, and which were omitted in the additional record filed by the Government in this cause. The filing of these briefs became necessary because of the unwarranted insistence of counsel for the Government that plaintiff in error has now changed his position from the one taken by him in the Court of Appeals, and that therefore he is estopped from claiming former jeopardy. That plaintiff in error has not changed his position so as to estop himself from maintaining his pleas, and that if either party has changed its position it is the Government, will be demonstrated here later from the said briefs filed in the Court of Appeals on the first writ of error.

None of the Points Made by the Government is Well Taken.

The Government contends that in order to claim former jeopardy it is necessary that there should have been a valid judgment pronounced on the plea of *nolo contendere* by the United States District Court.

This is not the law. No judgment is necessary.

4 Black. Comm., 336.

Greenl. on Ev. (15th ed.), vol. 3, sec. 38.

Bishop, Crim. Proc., sec. 581; and see also authorities cited in our main brief at page 21 *et seq.*

The Plea of Nolo Contendere Could Properly be Taken as a Compromise to the Whole Indictment.

The Government next insists that inasmuch as *nolo contendere* could not be pleaded to felony counts, therefore as to those counts there was no valid conviction, and plaintiff in error could be tried again; but in this respect the Government totally loses sight of the *very* decision of the Court of Appeals in this case which it claims is the law of the case. The Court of Appeals held that the plea of *nolo contendere* was in the nature of a compromise, and therefore, as a compromise, the district attorney, with the consent of

the court, could *elect* for the purpose of this case to stand only upon the misdemeanor counts carrying a fine only.

Having defined the plea to be in the nature of a compromise between the prosecuting officer and the defendant, the Court of Appeals said:

"So it was within the authority of the prosecuting officer to *elect to stand*, for the purposes of the plea on the counts applicable thereto, and was plainly within the jurisdiction of the court to approve such submission. Were the subsequent proceedings consistent with acceptance of the plea in that view, we are satisfied that no reversible error would appear in the allowance thereof." (Suggestions of Dim. Rec., p. 39.)

While insisting that the opinion of the Court of Appeals is the *law of the case*, counsel for the Government is actually sliding away from it, as will be seen from page 9 of their *main* brief. Speaking on this point, they say:

"That idea developed much later through an *unwarranted* application of a rather *anomalous* doctrine of election, announced in its opinion by the Circuit Court of Appeals."

And there were in this indictment counts authorizing a fine only. The indictment contained thirteen (13) counts. (Trans., 2.) The first four counts charged a violation of section 3286 of the Revised Statutes; counts 5, 6, 7, and 8, a violation of section 3317; count 9, a violation of section 3318; count 11, a violation of section 3326, and count 12, a violation of section 3324—all felonies.

Count 10 charged a violation of the act of July 16, 1892, chapter 196 (27 Stat. L., 200), which provides no penalty for its violation, the penalty therefor being governed by section 3456 of the Revised Statutes, *imposing a fine only*. The numbers of the various sections of the statutes upon which the prosecution is based are endorsed upon the back of the indictment, under the signature of the foreman of the grand jury. (Trans., 7.)

Count 13 charges a violation of section 3455 of the Revised Statutes, which is punishable by fine only if committed without intent to defraud the revenue, and by fine and imprisonment if committed with such intent.

Moreover, the Court of Appeals in the *Shapiro* case, in a *per curiam* opinion (Sug. of Diminution of Rec., 21, 22), specifically decided that: "The errors assigned are identical with those assigned in *Tucker vs. United States* (No. 1776), 196 Fed., 260, decided herewith, and no distinction from the indictment and record of proceedings there presented and considered appears in the present case, in so far as material for decision."

It is therefore not true, as suggested in the Government's motion to dismiss, page 20, that the Tucker indictment contained counts upon which a fine could be imposed, and that in the Shapiro case same were lacking.

Plaintiff in error cannot be held responsible for the act of the Government in *nolle prosequi* after the entry of the plea of *nolo contendere*, the only counts applicable thereto. If the Government saw fit to dismiss the whole indictment, it was its own business, but such action could not in any way affect the plaintiff in error.

State vs. Elden, 41 Maine, 166.

Mount vs. State, 14 Ohio St., 295.

The Acceptance of the Plea is Admitted by the Demurrer.

Ex parte Nielsen, 131 U. S., 183.

On this point the Government in its main brief, at page 2, states its position thus:

"The Government maintains that the record is not clear that the plea of *nolo contendere* was accepted; that its acceptance is not admitted by the demurrer to the plea of former jeopardy, since the allegation of its acceptance, contained in that plea, contradicted the record, which showed that the pleader was stopped to make such an allegation; that Shapiro may

not be heard to argue its acceptance; that unless the acceptance of the plea is clearly shown, valid proceedings will not be predicated upon it as a basis, and without such proceedings legal jeopardy cannot exist." * * *

The fallacy of this statement is apparent. How can the plea *contradict* the record if the record is not *clear* on the specific point? But, may it please the court, the plea does not attempt to contradict the record. The record being silent as to the acceptance of the plea of *nolo contendere* (except as to such natural inferences arising from the imposition of sentence thereunder and the recital in the record itself that the matter came up on the said plea), the plea of former jeopardy filed by Shapiro *merely supplies this omission* by the recital therein that

"while it is true that some ambiguity exists in the record * * * as written up by the clerk * * * whether the said plea of *nolo contendere* pleaded by this defendant was accepted by the court, nevertheless, in truth and in fact, the said *district court* did *accept* the said plea of *nolo contendere*, and acting under and upon said plea, heard evidence solely for the purpose of fixing the punishment to be imposed upon him, this defendant, and any recital in the record to the contrary or ambiguously stated is merely a *misprision of the clerk* of the court, for which this defendant cannot in any way be held responsible." (Printed Trans., 18-19.)

The Government also overlooks the fact that by no manner or means could the defendant have pleaded *nolo contendere* *except* by leave of court. The defendant, having pleaded not guilty, was not entitled, as a matter of right, to retract it and plead anew without permission of the court.

1 Chitty Crim. Law, 436.

Comm. vs. Blake, 12 Allen, 188.

Comm. vs. Lannan, 13 Allen, 563.

Accordingly, there still remains upon the plea of former jeopardy the question whether the defendant was not in jeopardy by the withdrawal of his plea of not guilty and the substitution in place of *nolo contendere*, all of which having been done by leave and consent of the court and prosecuting attorney, under the plea of *nolo contendere*, because the moment the plea was entered of record the defendant was in danger of being immediately sentenced upon his plea, which was equivalent to a plea of guilty.

But the acceptance of the plea of *nolo contendere* is admitted by the demurrer. As to the effect of a demurrer to a plea of former jeopardy, this court, in the case of *Ex parte Nielsen*, 131 U. S., 176, at page 183, said:

"It is true that in the case of *Snow* we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment or anywhere else in the record (of which the judgment is only a part), it is sufficient. *In the present case, it appeared on the record in the plea of autrefois convict, which was admitted to be true by the demurrer of the Government. We think that this was sufficient.*" (Italics ours.)

The cases cited by the Government are inapplicable. In some of them the exhibits attached to the pleading contradicted the recital of the pleading; in others the fact appeared clearly on the face of the record. Here the record is silent. The plea supplies an omission. The Government cites no former jeopardy cases to sustain its point.

What Was Shapiro's Claim in the Court of Appeals that He May Not Now Contend that the Plea of Nolo Contendere Was Accepted by the Court?

Now that the briefs filed in the Court of Appeals on the first writ of error by both sides are before this court, there will be no difficulty in demonstrating that Shapiro did not

take an inconsistent position in the Court of Appeals precluding him from pleading former jeopardy.

The evidence on this point may be found in the statement of the case made by the United States district attorney in the Government's brief in the United States Court of Appeals. Said the United States district attorney:

"There were 13 counts to the indictment charging, in different counts, the defrauding of the Government out of revenue tax on approximately 20,000 proof gallons of distilled spirits. The indictment was returned on June 21, 1910, and a plea of *not guilty* entered by the plaintiff in error three days later. On January 3, 1911, plaintiff in error appeared in open court, and, *by leave of the court, withdrew* his plea of not guilty to the indictment, and, *being arraigned a second time, pleaded nolo contendere. Thereafter, his case was called for disposition and of his own motion he took the witness stand, admitting the charges in the indictment practically in their entirety, and, on January 24, 1911, the court, upon the plea and the evidence adduced, sentenced plaintiff in error to two years' imprisonment in the penitentiary and to pay a fine of \$10,000.*

"The court very carefully listened to all of the evidence which plaintiff in error cared to offer, including his own statements under oath upon the witness stand. It did not enter the judgment immediately upon the entry of the plea, *but continued the case, as the record will show, from week to week, in order to give plaintiff in error an opportunity to show matters and things which might mitigate the punishment possible to inflict against him. He had due process of law.*" (Brief of Government, U. S. Court of Appeals, p. 2.)

And, again, that Judge Landis accepted the plea of *nolo contendere* and heard evidence only for the purpose of fixing the penalty, we cite the following from the same brief of the United States district attorney:

"No objection or exception of any kind to the action of the court in *permitting the withdrawal of*

his plea of not guilty and to the entry of the plea of nolo contendere was made or saved, and no objection or exception to the judgment and sentence of the court was made or saved, and the only point urged is that the court acted without jurisdiction in imposing a sentence of imprisonment upon the plea of nolo contendere. It is admitted that the judgment is valid so far as the fine is concerned." (See ~~last~~ 2nd page of Government's brief in Court of Appeals.)

The Government to sustain its point of estoppel relies merely upon the assignment of errors of plaintiff in error in the Court of Appeals, which do not sustain this point; but the assignment of errors was elaborated in the brief filed by plaintiff in error, in which it was contended that the plea of *nolo contendere* was not acted upon—that is to say, that the court in pronouncing a penitentiary sentence and making a finding of guilty acted in derogation of the plea. The Court of Appeals held that *nolo contendere* was a valid plea pleadable in the Federal courts, but that no imprisonment could be imposed under it. No estoppel was pleaded by the Government in the district court, and the question of estoppel comes up here for the first time. The Government for the first time here is seeking to take issue with the defendant on his pleas of former jeopardy. As appears from the opinion filed by the Circuit Court of Appeals, Shapiro in that writ of error contended, first, that the plea "was not entertainable under the assumed charge of felony *nor under any charge requiring imprisonment*," and thus constitutes no answer to the indictment, so that the conviction without jury trial was unauthorized, or, if entertainable, that the judgment *is in derogation* of said plea and was not authorized" (Opinion of C. C. A., Suggestion of Dimunition, page 27). It was also contended in that brief that no imprisonment can be had upon a plea of *nolo contendere*, and that the sentence of imprisonment was *excessive* based upon such plea.

The Solicitor General's brief assumes to quote from the opinion the contention of the plaintiff in error that the plea

had not been accepted, whereas, as will appear from a reference to the opinion itself (Suggestion of Diminution, page 39), what is quoted by the Solicitor General is merely the reason given by the Circuit Court of Appeals for sustaining the contention of plaintiff in error, which was "in substance that both proceedings and judgment are in derogation of the plea," as appears from the same sentence upon which the Solicitor General relies. Neither the assignments of error nor the brief of plaintiff in error in that court contains the contention which the Solicitor General assumes we urged in the Circuit Court of Appeals.

The Government evades the point that among the assignments of error on the first writ of error in the Court of Appeals plaintiff in error, Shapiro, assigned that "*the sentence is excessive and should be limited to a fine only*" (Suggestion of Diminution of Record, page 16). Estoppels are not favored in law. The assignment of error in the Court of Appeals that the district court was without jurisdiction to sentence Shapiro to the penitentiary on the plea of *nolo contendere* was intermixed with the other proposition that imprisonment cannot be had under such a plea.

Here are the "errors relied upon" as they appear in the brief for plaintiff in error filed in the Court of Appeals upon the first writ of error.

"Errors Relied Upon."

"First. The district court had no jurisdiction to pass judgment of imprisonment on this plaintiff in error in this case on a "plea" of *nolo contendere*, nor does the record affirmatively show that the plea was acted upon, but, on the contrary, it shows that the court proceeded to hear evidence like a trial before the court.

"Second. The district court erred in sentencing this plaintiff in error on its own finding of guilty without a trial by jury.

"Third. By the judgment of the said district court of the United States, plaintiff in error was deprived

of his liberty without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States of America.

"Fourth. The sentence is excessive and should have been limited to a fine only." (Page 2 of brief of plaintiff in error in Court of Appeals.)

No Waiver.

We have treated this subject in our main brief at pages 24 *et seq.*, and we respectfully refer the court to that brief. Counsel for the Government utterly misunderstand our position. Had the district court proceeded to pronounce the proper sentence, as was done in *Murphy vs. Massachusetts*, 177 U. S., 155, there would have been no error. The error and jeopardy arose in placing Shapiro on trial a second time. As shown by the brief filed in the United States Circuit Court of Appeals, he did not ask to set the plea of *nolo contendere* aside. He complained against the judgment of imprisonment. There is a distinction between setting a verdict or plea aside on motion of defendant and an erroneous sentence.

Conclusion.

Believing that the case was carefully presented by us in our original main brief, and upon the question of jurisdiction in our brief in opposition to the motion to dismiss, we leave this matter in the hands of the court, conscious that we have performed our whole duty.

Respectfully submitted,

ELIJAH N. ZOLINE,
Attorney for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID SHAPIRO, PLAINTIFF IN ERROR,	} No. 93.
v.	
THE UNITED STATES.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

A composite outline of the respective contentions of Shapiro and the Government on facts and law will help to define the issues.

Shapiro argues that the plea of *nolo contendere* was accepted; that his legal jeopardy began at the moment of filing that plea; that the indictment then contained counts to which the plea was a valid answer; that the subsequent *nol prosequing* of those counts, on the one hand, could not prejudice his interests, and on the other, actually did effect an

abandonment of the prison counts to which the plea was not a valid answer; that his jeopardy lay in his *conviction*, or in the *possibility* of being convicted, and that he did not waive his right to plead that jeopardy by prosecuting his writ of error from the Circuit Court of Appeals—merely objecting to the character of the sentence and judgment, but intended to have the conviction (he calls it also “the verdict”) left intact; that the Court of Appeals in its opinion effected just what he had intended and nothing more; that all the District Court had to do to conform to the law was to reduce its sentence to fine alone; that payment of half the fine had satisfied in part the first judgment, and that therefore no further judgment could be legally pronounced; and, finally, that the compromise with the Commissioner of Internal Revenue barred further prosecution.

The Government maintains that the record is not clear that the plea of *nolo contendere* was accepted; that its acceptance is not admitted by the demurrer to the plea of former jeopardy, since the allegation of its acceptance, contained in that plea, contradicted the record, which showed that the pleader was estopped to make such an allegation; that Shapiro may not be heard to argue its acceptance; that unless the acceptance of the plea is *clearly shown*, valid proceedings will not be predicated upon it as a basis, and without such proceedings legal jeopardy can not exist; that even if the plea

of *nolo contendere* was accepted, it never was a valid answer to the prison counts, and, regardless of whether there were fine counts in the same indictment, neither the acceptance of the plea nor the *not prossing* of the latter counts, could have effected an abandonment of the former; that Shapiro had not suffered a *valid* conviction in the original proceedings; that he so alleged before the Circuit Court of Appeals and that court upheld his allegation; that neither the filing of the plea nor its acceptance put Shapiro in jeopardy, a *valid* sentence being the essential and omitted step; that, granting that a valid sentence ever was or could have been pronounced in the *Shapiro* case upon the plea of *nolo contendere*, Shapiro waived his right to predicate former jeopardy thereon by prosecuting his writ of error from the Circuit Court of Appeals; that the sentence of fine was as invalid as that involving imprisonment, the plea of *nolo contendere* not being a valid answer to the counts upon which the sentence was pronounced; that the payment of the fine, in whole or in part, could not discharge Shapiro's duty to respond to the statutory requirement of imprisonment for the offense with which he was charged; and, finally, that the compromise alleged to have been accepted by the Commissioner of Internal Revenue was not shown to have fulfilled the requirements of the statute governing the same.

OUTLINE OF ARGUMENT.

I. *There was no jeopardy.*

- (A) Argument on the facts.
- (B) Acceptance of the plea of *nolo contendere* can not be established through the doctrine of admission by demurrer.
- (C) No basis for claim of jeopardy here before first judgment. That was set aside at Shapiro's instance.
- (D) Acceptance of the plea of *nolo contendere* may not be argued or alleged by Shapiro, who, in the same cause, has taken the contrary position.
- (E) Even on an accepted plea of *nolo contendere* a judgment upon prison counts would be *void*.
- (F) Payment of half the fine was no discharge of defendant's obligation to respond to prison sentence.

II. *The plaintiff in error may not plead jeopardy.*

- (A) By prosecuting his former writ of error from the Circuit Court of Appeals Shapiro waived former jeopardy.

III. *There was no compromise.*

- (A) The plea did not aver facts essential to an authority in the commissioner to compromise with Shapiro under section 3229, Rev. Stat.

ARGUMENT.

I.

THERE WAS NO DOUBLE JEOPARDY.

(A) None in fact.

As to the acceptance of the plea of *nolo contendere*.

Shapiro had, by leave of court, withdrawn a plea of not guilty, previously entered. He had thereafter entered a plea of *nolo contendere*. Asserting that this latter plea was entered *in the presence of the district attorney* (his brief, pp. 3 and 19), he concludes that therefore the district attorney consented to the plea. (As if even the express consent of the district attorney could possibly make it a valid plea.)

The court record contains the following:

* * * and by leave of court first had and obtained said defendant withdraws his plea of not guilty heretofore entered herein and being now arraigned upon the indictment filed herein against him pleads *nolo contendere* thereto. (R. 9.)

Shapiro ignores the punctuation and the necessary break in the thought, the sentence, and in reality (caused by the intervention of a rearraignment); and asserts that this sentence shows that he filed his plea of *nolo contendere* "by leave of court." (His brief, p. 14.)

Again, he finds a formal entry by the clerk of court (R. 10) to the effect that—

This cause coming on to be heard *on defendant's plea of nolo contendere heretofore entered herein*, * * * the court * * * takes the cause under advisement.

And out of the italicized words he deduces an acceptance by the court of his plea. (His brief, p. 15.)

The foregoing alleged *indicia* of the said acceptance were before the Circuit Court of Appeals. But that court did not construe them as indicating an acceptance of the plea of *nolo contendere* at all. Shapiro was then emphasizing *indicia* not of acceptance, but of nonacceptance of the plea, and that court, construing the same record, decided, upon Shapiro's express request, that—

It does not appear in the record that the plea tendered on behalf of the defendant was either accepted in fact as a *nolo contendere* plea, or substantially so treated * * * in the subsequent proceedings. (196 Fed. 260, 267, 268.)

Shapiro, facing a retrial by jury in the District Court, sought escape in a plea of former jeopardy. Unless an accepted plea and some kind of valid proceedings could be injected into the record, no jeopardy could have attached. The record, and the self-sought decision thereon, of the higher court, stood in his way. The record upon which he had argued nonacceptance of the plea would not be very

useful, thought Shapiro, as a basis for arguing an accepted plea and *autrefois convict*.

He made a thorough attempt, *in two courts*, to remedy the situation. The steps taken are disclosed in the "Suggestion of diminution of the record" filed by the Government on October 2, 1914. Though unsuccessful, that attempt was none the less significant. Shapiro asked the District Court to amend its record to show that its judgment was based upon an *accepted* plea of *nolo contendere*. He also petitioned the Circuit Court of Appeals to release its mandate to enable the District Court to make such an amendment. Although he argues that there is nothing in the record which negatives the fact of acceptance of his plea (his brief, pp. 18, 19), the filing of that petition in the Circuit Court of Appeals was unequivocal admission on his part that *there was something* in its mandate which would prevent the necessary alteration of the District Court's judgment, and would defeat his plea of former jeopardy.

Whatever stood in the way of that plea when he filed said petition stands there still, for the court of appeals denied the petition. Shapiro must face that obstacle as best he can. He attempted to overcome it by omitting all reference to those proceedings in the transcript presented to this court.

He argues that he went before the District Court *the second time*, with a materially improved record as to the acceptance of his plea, by reason of the

allegation in his plea of former jeopardy that the *nolo contendere* was accepted, and the Government's alleged admission of those allegations by demurrer thereto. (His brief, p. 17.) The principle here obtains that a demurrer to a pleading does not admit an allegation which contradicts the record, or which the pleader is estopped to make (*infra*). The Court of Appeals ruled that the record presented to it did not show an acceptance of the plea or proceedings consistent with such an acceptance. *Shapiro's plea of former jeopardy itself recites that ruling* (R. 34); and he admitted its force when he sought to alter the record so that it might so show. Upon such a record, if issue had been joined upon the plea of former jeopardy, Shapiro could not have offered evidence in support of the allegations of the acceptance of the plea, and we shall see (I. B., *infra*) that this is a final test.

As to the nol prossing of the counts involving fine alone.

Nothing happened in the case between the filing of the plea and the nol prossing of the fine counts. The record recites (R. 10) that, after such "nol prossing" and on the same day, January 20, 1911:

This cause coming on to be heard on defendant's plea of *nolo contendere* * * * come the parties by their attorneys and the defendant in his own proper person, and the hearing proceeds, and the court having heard the evidence * * * takes the cause under advisement.

During all these proceedings there was no suggestion that there had been *abandonment of the whole indictment* by the *nol prossing* of the fine counts. That idea developed much later, through an unwarranted application of a rather anomalous doctrine of election, announced in its opinion by the Circuit Court of Appeals. On January 20, 1911, *after* the *nol prossing* of the fine counts, "the hearing proceeds," the court hears evidence and takes the cause under advisement. Surely no implied election here, by the district attorney, to give up the prison counts and to choose to stand, as was said in the *Tucker* case, upon the counts applicable to the plea, viz, *those involving fine alone*. Rather an express election to stand upon the *prison* counts, and a *submission by the defendant himself without objection of any kind* to the hearing upon that basis, with a prayer for mercy in connection with the expected sentence upon the prison counts. The doctrine of election of the *Tucker* case may not be applied to the *Shapiro* case in any offhand manner. Shapiro might have tendered several pleas. Shall the district attorney, because present, be held to have elected to stand upon "the counts in the indictment applicable thereto"? And then, if there be any count to which none of those pleas applies, shall that count be deemed abandoned? If so, a defendant by failing to plead to a particularly onerous count, would be forever acquitted thereof. Shall we conclude that the district attorney, after

the filing of the *nolo contendere* plea, chose to go to trial upon the fine counts, when upon the very next appearance of the parties in court he nol-pressed every one of them? All parties fully realized that they were proceeding upon the counts in the indictment *involving prison sentence*, and under a plea (accepted or not accepted) of *nolo contendere*. Shapiro may not contend that on January 23, when he begged for mercy, he was begging for a fine or an acquittal in place of a prison sentence. He knew that the case and evidence had been heard *upon three counts*, under each of which the court was by statute bound, if it sentenced him at all, to sentence him to *fine and imprisonment*. There was no error in the sentence on the ground that it involved imprisonment *when it should have been only a fine*, for by statute, if there was to be a sentence, it *must* include imprisonment.

The plea of *nolo contendere* is undoubtedly in the nature of an offer to compromise, but to compromise in connection with those counts to which the plea is applicable. It can not be accepted as a plea to a count involving prison sentence. *A fortiori* it can not be accepted as a compromise of such a count, and work an abandonment thereof, simply because a fine count was included in the same indictment.

Shapiro can not argue that there should have been a sentence of fine alone. The fine counts were nol-pressed and defendant neither can nor does

claim any right to have them rehabilitated. He is forced to the position, then, that he should not have been sentenced at all—that he should have been acquitted.

Such a position is equally untenable. Whether or not the District Court erred (as Shapiro alleges before the Circuit Court of Appeals, and as that court decided) in proceeding *at all*, in connection with the counts involving prison sentence, upon a plea of *nolo contendere*, and whatever may be the correct decision upon that allegation of error, there can be no justification for claiming that the District Court should have assumed jurisdiction, under the said plea, simply for the purpose of pronouncing an acquittal. By the mere fact of the two charges being combined in one indictment, a court would, under such a doctrine, acquire jurisdiction to pronounce judgment in connection with an infamous crime which it could not otherwise exercise. Little would then remain of the rule of law propounded by Shapiro before the Court of Appeals and admitted by him here, that *nolo contendere can not be pleaded* to a charge involving imprisonment.

As to when, if at all, jeopardy attached.

Granting, for argument's sake that jeopardy could have attached, *when* could it have begun? Shapiro contends it actually began the moment he filed his plea. (His brief, p. 21.) He says that the test is: Could a valid judgment have been en-

tered against him as soon as he filed the plea of *nolo contendere*? (His brief, p. 27.) He would not allow us to ask the correlative question: Was a valid judgment ever entered? The actual happening, not the possibility, is the essential element. Shapiro, according to his present theory, might at once, after filing the plea, have claimed immunity from further prosecution. The Constitution in prohibiting double jeopardy was not concerned with *possibilities*. Until something *happened* in the District Court after his plea of *nolo contendere*, Shapiro had not been jeopardized. The next actual happening was the *nol-prossing* of the fine counts, leaving none to which his plea could possibly apply, or on which he could possibly be once legally sentenced *under that plea*. The plea was no more applicable to the prison counts *before* than after the *nol-prossing* of the fine counts. Shapiro relies upon the case of *Buck v. Commonwealth*, 107 Pa. St. 486, to show that jeopardy results from *conviction* and is not dependent upon a judgment. (His brief, pp. 23, 24.) We would agree with the contention if the word "conviction" were modified by the word "*valid*." He quotes from the *Buck* case (p. 489), thus:

A defendant who is sentenced upon such a plea to pay a fine is convicted of the offense for which he was indicted.

Precisely, but what of a defendant who is *illegally* sentenced upon such a plea? Is he convicted

of the offense for which he was indicted? Shapiro should have read further in the opinion in the *Buck* case. The passage which he has quoted as from the opinion of the court was quoted by the court from Wharton, and is expressly *distinguished* from the finding of the court on the following page, where it says:

What more is the plea of *nolo contendere* than a confession? *Had judgment been entered upon the plea, the record would have been competent evidence of the conviction. But there was no judgment; only a plea,* which was at best only a qualified admission of guilt * * *

The same weakness appears in Shapiro's quotation from *White v. Creamer*, 175 Mass. 567, 568:

We do not doubt that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered.

But is the Massachusetts court there referring to an *invalid* sentence? In the *Shapiro* case the sentence was invalidated and the judgment unsupported for want of an authorized plea to the indictment.

In the above quotations Shapiro proves the point for which we contend, viz., that it is not the offer of the plea of *nolo contendere*, nor yet the *acceptance* of it, making immediate sentence *possible*, which puts an accused in jeopardy, but the *sentencing* of defendant under such a plea. And unless the

sentence is *valid*, there is no conviction, and without conviction there is no jeopardy. Shapiro admits the conclusion when he emphasizes so many times that he was not, in the Circuit Court of Appeals, attacking the conviction (he refers to it as "setting aside the verdict"), but only the sentence and judgment of the District Court.

As to the position taken by Shapiro and by the court in the Circuit Court of Appeals.

The inconsistency of Shapiro's present position, not only with his former position before the Circuit Court of Appeals but as well with rulings, are best shown by its proceedings.

He made no mere attack upon the character of the judgment and sentence of the District Court, as he now affirms (his brief, pp. 24, 27), nor was he seeking merely a modification of sentence, in accordance with progressive principles subsequently deduced from the Court of Appeals opinion. He (1) denied the jurisdiction of the District Court to find him guilty of an infamous crime upon an unaccepted plea of *nolo contendere*; (2) assigned as specific error that he had *not* been tried by a jury; and (3) attacked, constitutionally, the process under which he had been convicted. His first three assignments of error were:

First. The District Court had no jurisdiction to pass judgment on this plaintiff in error in this case on a plea of *nolo contendere*.

Second. The District Court erred in sentencing this plaintiff in error without a trial by jury.

Third. By the judgment of the said District Court of the United States, plaintiff in error was deprived of his liberty without due process of law within the meaning of the fifth amendment to the Constitution of the United States of America. ("Sug. of Dim. of Rec.," pp. 16-17.)

Here was no mere assignment that the sentence should have included only a fine. Nor did the Circuit Court of Appeals come to any such conclusion. The court did exactly what Shapiro, in his first assignment of error, claimed it should do—held that the District Court had no *jurisdiction to pronounce judgment upon prison counts upon a plea of nolo contendere*. Because its main opinion was in the *Tucker* case (where fine counts endured throughout), it even agreed with Shapiro's contention that added irregularities in the District Court's procedure were (1) the failure of the record to show that the plea had been accepted, and (2) the inconsistency of the subsequent proceedings with such an acceptance.

The Circuit Court of Appeals held (in the *Tucker* opinion) that, as to the prison counts the court could have no jurisdiction to render a judgment under such a plea, and as to the fine counts, it had not perfected it; that upon the prison counts there never could have been a valid judgment, and

upon the fine counts there never was. In the *Shapiro* case no fine counts remained, so only that part of the opinion dealing with those involving prison sentence applied. The inconsistency of Shapiro appears at no point more glaringly than here. He denied the jurisdiction of the District Court in his writ of error from the Circuit Court of Appeals, yet in one of his pleas of former jeopardy (R. 17, 20) he affirms:

This defendant further says that the said District Court of the United States as a Federal Court *had full authority* and jurisdiction of the subject matter and the person of this defendant, as set forth in said indictment.

It remains only to determine just what the Circuit Court of Appeals announced as to the doctrine of election. True, it *inferred*, in the *Tucker* case, an election on the part of the district attorney to stand upon the counts involving fine, *because it found the district attorney going to judgment and sentence with those counts still in the indictment*. That it was merely by a process of inference that the court established the election is clear. In a single sentence the court pointed out that the district attorney *might* be held to have elected to submit the case on those counts alone to which the plea was applicable, and that the court *might* have approved such submission. It then said that it would be satisfied that there was no reversible error if "the subsequent proceedings" were "consistent with acceptance of the plea in that view." The

"subsequent proceedings," referred to, were all of the proceedings subsequent to the filing of the plea, and from a careful study thereof the court concluded that the court below had *not approved of the submission* of the case upon that basis, because the plea was not treated as accepted in the subsequent proceedings. Applying the same test—inference from subsequent proceedings—what must the court have inferred in the *Shapiro* case, if it had dealt separately with each case, as to the district attorney's having elected to stand upon the fine counts? The implication is precisely the reverse. Indeed, it is a fact, and not an implication at all, that the district attorney, in the *Shapiro* case, elected to stand "for the purposes of the plea," and for every other purpose, upon the counts in the indictment to which, under the ruling of the Circuit Court of Appeals, a plea of *nolo contendere* was *not* applicable. He dismissed the very counts upon which, in the *Tucker* case, the court inferred he had elected to stand.

(B) Acceptance of the plea of *nolo contendere* can not be established through the doctrine of admission by demurrer.

Shapiro insists that he does not insert a new basis of fact into the record, or contradict the judgment of the Circuit Court of Appeals, or speculate as to what did, or ought to have happened, because the Government admitted, by its demurrer to his plea of former jeopardy, the fact alleged therein, of

acceptance of his *nolo contendere* plea. (His brief, pp. 17, 18.) True, a demurrer to a pleading admits material allegations of fact well pleaded. But Shapiro has brought his case within one of the most clearly established exceptions to this rule. A demurrer to a pleading does not admit an allegation which contradicts the record, or one which the record shows the pleader is estopped to make. Gould, in *Principles of Pleading*, chapter 9, section 25, says:

A demurrer, though general, never confesses an allegation which it appears on the face of the pleadings that *the pleader* is *estopped* to make; as if, having pleaded or confessed a *record*, to which he is a party he afterwards makes an averment, *contradicting* or *impugning* it. (The italics are the author's.)

In *Murray v. Murphy*, 39 Miss. 214, appellant sought review of a probate of a will, alleging there were only two attesting witnesses. A demurrer to the petition was sustained, and the petition dismissed. The court, ruling the will was duly attested by three witnesses, said (p. 221):

It is, however, urged that, as the petition *alleges* that the will was signed by *but two* attesting witnesses, and *this is admitted* by the *demurrer*, this allegation must be taken as true as the case is now presented. *But* the will and the *record* of the proceedings in relation to the probate *are incorporated* into

the *petition*; and, indeed, the very ground on which it is based is that there appears to be error in the record and proceedings in relation to the probate. If the record thus shown negatives the allegation of the petition, the *appellee is not concluded, by his demurrer, of the benefit of the facts shown by the record* * * *.

In the instant case, the plea of former jeopardy even alleged (R. 18):

The said Court of Appeals further held that it did not appear from the record before said Court of Appeals that the *nolo contendere* in behalf of this defendant was accepted by the said District Court and for this reason the said Court of Appeals reversed the judgment of the said District Court * * *.

The record thus shown negatives the allegation of the plea, and the Government is not concluded, by its demurrer, from advantage of the facts shown in that record (itself a part of the plea and necessarily to be taken into account in considering its merits).

In *Scofield v. McDowell*, 47 Iowa, 129, plaintiff claimed title to land under two tax deeds. The answer admitted their execution and due form, but alleged that the land was sold without advertisement. On demurrer to the answer the court says (p. 130):

The law attaches to these deeds certain properties or qualities. One of these is that

the deeds are conclusive evidence that the lands were duly advertised for sale * * *. Is it, then, competent for a pleader to admit the execution of such deed and at the same time deny the legal inference which the law conclusively raises? It seems to us clear that it is not competent so to plead. If, however, such a pleading is interposed, does a demurrer thereto admit the truth of the allegation improperly made? * * * *Suppose the plaintiffs, instead of demurring, had gone to trial upon the pleadings. The defendant then would not have been permitted to introduce any proof that the lands were not advertised. If, because of the law and the condition of the pleadings, the defendant would not have been permitted to offer any proof of this allegation upon the trial, it must be true that a demurrer to it does not admit its truth.*

In *Granite Company v. Townsend*, 52 Atl. 432 (Vt. 1902), the defendant undertook to impeach an officer's return, which was good on its face, by a plea in abatement which was demurred to. The court says:

A demurrer admits only such facts as are well pleaded, and therefore never admits an allegation that the pleadings show the party is estopped to make, for such an allegation is not well pleaded. * * * Hence, the facts here alleged in contradiction of the return, not being well pleaded, are not admitted by the demurrer, and can not be considered.

In *Martin v. McCall*, 93 N. E. 418 (Ill. 1910), the court said (p. 420):

The averment of a fact which appellants' bill shows could not be inquired into on hearing is not admitted by the demurrer. The statute which makes the judgment confirming the acceptance of a local improvement conclusive of the fact that the improvement is made in substantial compliance with the ordinance *can not be nullified by the admission of parties, in their pleadings or otherwise.*

In *Blue Grass Canning Company's Assignee v. Illinois Central Railroad Company*, 119 S. W. 769, 770 (Ky. 1909), the Court of Appeals of Kentucky said:

It is true the petition alleges that the plaintiff is the owner and holder of the claim, and on demurrer the allegations of the petition are taken as true; still the exhibit is filed with and made a part of the petition, and although the petition, considered alone, states a cause of action, when read in connection with the exhibit it does not, and the exhibit must be taken into consideration, and, where it contradicts or fails to support the allegations of the pleading, it makes it bad even on demurrer (p. 770).

In the *Shapiro* case, the opinion of the Circuit Court of Appeals was that the District Court record failed to show acceptance of the plea, and that the "subsequent proceedings" were inconsistent with such an acceptance. That was the effect of the

record before the District Court on retrial, and no allegation to the contrary by Shapiro, nor admission thereof by the Government, could nullify its effect.

Had the district attorney here joined issue upon the plea, Shapiro would not have been permitted to introduce any proof that the plea of *nolo contendere* had been accepted (having invited the ruling of the Court of Appeals that it had not been). If Shapiro could not have offered proof of this allegation upon trial, it must be true that a demurrer to it does not admit its truth.

(C) Until the first judgment there was no basis for claim of jeopardy. That judgment was vacated, confessedly, at Shapiro's instance. No jeopardy could survive.

Either a plea of guilty, or of *nolo contendere* (accepted), or a jury trial with opportunity of full defense given the accused with resulting verdict, is an essential to a valid judgment. (*Garland v. Washington*, 232 U. S. 642, 644.) In the case at bar there was neither jury trial nor verdict, and therefore there could be nothing to support a valid judgment, unless there was a valid plea. The plea of "not guilty" had been withdrawn and a plea of *nolo contendere* tendered. The Circuit Court of Appeals, in its opinion, says that Shapiro on his writ of error there contended:

It does not appear in the record that the plea tendered * * * was either *accepted* in fact as a *nolo contendere* plea or substan-

tially so treated * * * in the subsequent proceedings. (196 Fed. 267, 268.)

The court sustained this contention of his, holding that "*when* accepted by the court it becomes an implied confession of guilt and * * * equivalent to a plea of guilty" (p. 262), and that—

these proceedings and recitals leading up to the judgment are inconsistent with the *acceptance* of the *nolo contendere* plea; (and that the judgment was) *unsupported for want of either of the authorized pleas* to the indictment.

This decision became, and *yet is, the law of this case*, and *finally* determined that the first judgment and sentence were invalid for lack of proper support. *After* this decision Shapiro confessed the uncertainty, *at least*, of the record which he had filed in the Circuit Court of Appeals, in respect to the acceptance of the plea, and sought unsuccessfully in two courts to correct that confessed uncertainty. (Sug. of Dim. Rec. 177, App. 5.)

Moreover, while the plea of not guilty was applicable to each of the 13 counts in the indictment, the substitute plea of *nolo contendere* was not a proper plea or one that could be *legally* accepted to any count save the one *punishable by fine only*, and the Circuit Court of Appeals so held on Shapiro's insistence. The case then and thereafter stood thus before the law: To 12 counts the valid plea of not guilty had been withdrawn and no other legally

offerable or legally acceptable plea presented; to the remaining count a proper substitute plea tendered and claimed by Shapiro to have been accepted.

But this latter count (10) was later dismissed, and thereby Shapiro stood acquitted of *that* charge and of each of the prison counts as were likewise *then* dismissed. As to the remaining four prison counts, they stood opposed by apparent pleas only, which, whether accepted or not *in fact*, could *not* be legally acceptable or available. As to them the case was one of "no plea" after the withdrawal of the plea of not guilty; and in this condition the court, without jury trial or verdict, proceeds to hear evidence and pronounces a judgment, which judgment is later vacated at Shapiro's instance.

Of course, the court, in the *Garland* case, *supra*, had no occasion to consider when jeopardy first attached. Manifestly it could not have attached prior to the empanelling of the jury, for there was no plea. But in the case at bar there was neither plea of guilty, jury trial, nor verdict. Given no sufficient plea, there was nothing on which to hang even a claim of jeopardy *until the judgment*. And the latter is unavailing for that purpose for three reasons: (1) It had no essential support in the proceedings prior to its rendition; (2) it was *conclusively adjudged invalid* for lack of such support; and (3) it was set aside at Shapiro's own instance.

- (D) Acceptance of the plea of *nolo contendere* may not be argued or alleged by Shapiro, who, in the same cause, has taken the contrary position.

This court has denied the right of a party to a cause to take such an inconsistent position under conditions practically identical to the instant case. In *United States v. Beatty*, 232 U. S. 463, 468, it said:

Here the use sought to be made of the writ is not an admissible one. Whether the seventh amendment, preserving the right of trial by jury, embraces a proceeding to condemn land for public use, was one of the questions arising for decision in the Circuit Court of Appeals. In deciding it the court but exercised an undoubted jurisdiction, *and this whether the decision was right or wrong. If wrong, it was a mere error, and the landowners, having invited it, will not be heard to complain.*

In *United States v. Jones*, 31 Fed. 725, 728, the facts were strikingly like those in the case at bar. After verdict and sentence, a plea in abatement had been upheld, the indictment dismissed, and the prisoner arraigned upon a new indictment. He pleaded former jeopardy. The Government demurred. The demurrer was sustained, on the broad ground that upon a second trial, *secured on defendant's own motion*, former jeopardy can not be predicated upon the first proceedings. The court then says:

The observations of counsel, which have the effect of intimations that the decision of

the circuit court declaring the indictment fatally defective was erroneous, will receive no attention at this time. * * * the prisoner will not now be heard to criticize a judgment which he then insisted should be granted. * * * While counsel may go to great length in defense of one charged with crime, they can not be heard to blow hot and cold upon the same issue in the same record.

Shapiro's omission of part of the record in this case was undoubtedly to enable him to deny that he was blowing hot and cold upon the same issue, and to argue that his hot breaths were all blown into the record before the Circuit Court of Appeals, and that only the frigid blasts were incorporated in the record to this court.

Bigelow, in his *Treatise on Estoppel*, says, at page 783 (6th ed.):

It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one can not play fast and loose. * * *

The principle under consideration will apply to another suit than the one in which the action was taken, where the second suit grows out of the judgment of the first. It is laid down that a defendant who obtains judgment upon an allegation that a particular obstacle exists can not in a subsequent

suit based upon such allegation deny its truth (p. 789).

Although the latter paragraph deals with an independent subsequent suit, the principle applies with even greater force to proceedings in the same case, had under a mandate of an appellate court. This court has stated the principle in the following language, in *Davis v. Wakelee*, 156 U. S. 680, 689:

It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. * * * He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position.

(E) Even on an accepted plea of *nolo contendere* a judgment upon the prison counts would be void.

In considering the plea of former jeopardy, it matters not whether the original district court judgment against Shapiro was void or voidable. If the former, the plea was bad, for void proceedings can never make legal jeopardy. If the latter,

the jeopardy was nullified or waived by the reversal of the judgment on Shapiro's writ of error. Though admitting the court had jurisdiction of his person and to try his offense, we nevertheless maintain there *never* was any legal jeopardy because the first judgment was "*unsupported by any authorized plea.*" In *Sennott's case* (cited by Shapiro, brief, p. 34), 146 Mass. 493, the court recognizes an exception to the general rule that, given jurisdiction of the person to try the offense charged, the judgment is voidable and not open to review on *habeas corpus*. The court says:

The rule to which we have referred does not necessarily imply that *every* judgment which a court having jurisdiction of a person and of his offense might render would be held to be within its jurisdiction and not open to inquiry upon habeas corpus. It is always a pertinent question whether or not the act under consideration was done *in the exercise of the existing jurisdiction* (citing cases); and *we can conceive of a sentence so foreign to the law* and to the case before the court, and *so far in excess of the power conferred upon the court* as to furnish ground for an argument that it was not merely erroneous but entirely outside of the jurisdiction.

So in *Ex parte Lange*, 18 Wall. 163, this court, at page 174, said:

The judgment first rendered, though erroneous, was not absolutely void. It was ren-

dered by a court *which had jurisdiction of the party and of the offense*, on a *valid verdict*.

The latter element, *a valid verdict*, is an essential. And later in the same opinion, when this court is considering the nature of the *second* judgment, it distinguishes a *void* judgment in the following language (p. 176) :

It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attain, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.

It seems clear that under the above language the original judgment pronounced upon Shapiro must be considered void. Indeed, the Circuit Court of Appeals in reviewing that very judgment held that it was “*unsupported* for want of either of the *authorized* pleas to the indictment.” As long as the proceedings were not consistent with an acceptance of the plea, it said, the judgment upon the fine counts was unsupported and therefore void, and as long as the plea could not, as a matter of law, be accepted as an answer to imprisonment counts, a judgment upon them could not be supported. Shapiro, in his brief (p. 18), affirms that the plea was a substitute for a verdict. If, then, there was no authorized plea, there was no authorized verdict, or its equivalent, within the language of this court in the *Lange* case.

It should be remembered that the declaration of the Circuit Court of Appeals in this case, in the opinion (the adopted *Tucker* opinion) secured by Shapiro, is the law of this case, and in this view we need not inquire into the question whether the judgment would be void or voidable under general law. It is only upon the theory that the court had the power to decide whether it would pronounce judgment without a plea, or on trial, or upon a plea of *nolo contendere* to imprisonment counts, and that its decision in this regard was a mere error of law, reviewable only on direct appeal or writ of error, and that there was nothing in the decision

of the Circuit Court of Appeals holding to the contrary, that we may reach the conclusion here that the first judgment was merely voidable.

Of the cases cited in the Shapiro brief (pp. 32-36, inclusive) only two involve denials of the writ of *habeas corpus* on the ground that the errors complained of were decisions within the jurisdiction of the court. The first, the *Parks* case, 93 U. S. 18, involved a decision that the acts charged in the indictment did not amount to an offense against the laws of the United States, a question clearly within the power of the court to decide; while in *Sennott's* case, *supra*, it is expressly stated that all proceedings were regular down to and including the judgment itself. (146 Mass. 492.) And, of course, as a void judgment can not support a plea of double jeopardy, *even if unreversed*, it can gain no efficiency in this regard if reversed upon review.

(F) Payment of half the fine was no discharge of defendant's obligation to respond to prison sentence.

Payment *in full* of the original fine imposed by the District Court could have effected no discharge of Shapiro's obligation to respond to the prison counts. The sentence was either void or voidable, as we have seen. If void (because of no valid plea) its invalidity went to the legality of the fine as much as to that of the imprisonment. If voidable, Shapiro elected to avoid it by his writ of error from the Court of Appeals, and, in the language of the

Trono case, *supra*, he can not "limit his waiver as to jeopardy" (p. 153).

Shapiro calls attention (brief, p. 29) to the "bipartite" character of the judgment in the *Lange* case. It was, indeed, bipartite. It included a double sentence, either one of which constituted full satisfaction of the alternative penalty. One had been executed; this court relieved defendant from executing either the other or a substitute for both. There is no such bipartite judgment in the instant case. The statute required sentence of fine *and* imprisonment. Without a valid plea, the *whole* sentence was invalid, not merely *a part*. The fine stands or falls with the imprisonment. The imprisonment having been eliminated, the fine is *not a valid sentence*, and Shapiro's allegation that the valid portion of the sentence has been executed falls of its own weight.

In the *Lange* case the statute called for either fine *or* imprisonment; the judgment called for *both*; *Lange* objected, and this court relieved him of the obligation to make *double* satisfaction. In our case the statute called for both of two punishments, fine and imprisonment; the judgment called for both; Shapiro objected, and the Circuit Court of Appeals relieved him of the obligation to make any satisfaction, because the judgment was unsupported for want of a valid plea. The test is, whether, after the judgment of the Circuit Court of Appeals, the fine sentence could have been enforced. Was the judg-

ment pronounced upon it valid? By paying the fine, Shapiro no more relieved himself of his obligation to serve a term in prison than he would have relieved himself of his obligation to pay \$9,000 of a \$10,000 fine by paying \$1,000. In such case, as here on appeal, the issue would be as to the validity of the \$10,000 fine. If held invalid, he would be entitled to a return of the \$1,000; but his payment of \$1,000 or any sum less than the whole would not in itself, bar further prosecution. If, on the other hand, the \$10,000 fine was held voidable only, the defendant would have waived his right to plead satisfaction by having appealed therefrom. The bipartite nature of the Shapiro judgment, if it had one, was very unlike that which formed the very basis of the Lange decision. Paying money which constitutes a full response to a statutory penalty may well be held to protect a defendant from further prosecution. Paying half a fine, which if paid in full, would not fully respond to a judgment, whether void or voidable, can not (certainly when that judgment is reversed on defendant's own motion), preclude a valid conviction for the same offense.

In *Ex parte Spencer*, 228 U. S. 652, a defendant sought discharge under *habeas corpus* from an alleged erroneous prison sentence. He urged that, having paid a fine which was valid, he should be relieved from further sentence of imprisonment; and he cited, as does Shapiro, in support of his po-

sition, *Ex parte Lange*. At page 662 this court said:

The remarks of the court are pertinent to the *next contention of petitioners, which is that the sentences have a legal part, to wit, the fine of \$500 and costs, and an illegal part, to wit, the imprisonment, and that having fulfilled the legal part they are entitled to be discharged from the illegal part.* In support of the contention they invoke *Ex parte Lange*, 18 Wall. 163. * * * It was held that the court had not power to vacate the judgment and resentence the prisoner, that such action was double punishment for his offense, the legal part of the former sentence having been satisfied. It was further held that the judgment was void, not merely erroneous, and the prisoner was entitled to be discharged upon petition in *habeas corpus*. *Two answers are opposed to the contention that the case is controlling of the case at bar.* The case was put upon the ground that the Circuit Court had exhausted its power. In the case at bar the judgment of the Court of Quarter Sessions was subject to review and modification by the Supreme Court. * * * The sentences imposed on petitioners were, therefore, not void but erroneous only and subject to change or modification by the Supreme Court, or reversal, and petitioners subject to resentence, and *Ex parte Lange* does not apply.

Shapiro affirms that the doctrine of waiver has never been applied, when the valid portion of the

original judgment had been executed, as in the *Lange* case. We have seen that the original fine imposed upon Shapiro did not constitute a *valid* portion of the original judgment. We call attention, in this connection, to *Trono v. United States*, 199 U. S. 521, referred to again, and more fully, in "II A," below. There the doctrine of waiver was applied to a judgment which acquitted of the greater, while convicting of the lesser, charge. As fully as was within the power of the defendant ever to execute it, the judgment of acquittal in that case was *fully executed*. Had it not been for Trono's appeal from his conviction upon the lesser charge, and the consequent intervention of the estoppel doctrine, his acquittal, upon the greater charge, must have stood forever. Yet this court took away from the defendant even his judgment of acquittal, merely because he asked to be relieved of a concomittant judgment of conviction.

II.

PLAINTIFF IN ERROR MAY NOT PLEAD FORMER JEOPARDY.

(A) By prosecuting his former writ of error from the Circuit Court of Appeals, Shapiro waived the former jeopardy.

By far the least equivocal statement in the opinion of the Circuit Court of Appeals was, "the judgment of the District Court is reversed." Without doubt that judgment had been held for naught. Whether because a judgment so set aside ceases to

be jeopardy (the repetition of which for the same offense the Constitution forbids), or because the setting aside results from the *efforts of the accused*, former jeopardy can not be predicated upon it.

While proceedings interrupted, or a judgment defeated, without the approval or consent of the accused, have been held to support a plea of former jeopardy, a reversal, upon defendant's own motion, involves a waiver of that defense.

Cooley, in *Constitutional Limitations*, at pages 469 and 470, says:

If, after verdict against accused, it has been set aside on his own motion for a new trial, or on writ of error, or the judgment thereon been arrested, in any of these cases, the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection.

In Wharton's *Criminal Pleading and Practice* (9th ed.), paragraph 510, it is said:

A conviction set aside on defendant's motion on account of erroneous ruling by the judge, is no bar to a second trial. The defendant, by setting up the position that the ruling was erroneous, is afterwards estopped from disputing this. He affirms that he never was in legal jeopardy, and that the ruling of the judge against him, putting him in jeopardy, was not law. When he gains his point he can not afterwards plead jeopardy.

In *United States v. Ball*, 163 U. S. 662, two defendants, sentenced to death, sued out a writ of error from this court, alleging that the indictment upon which they had been tried was defective for want of particularity. This court held the indictment insufficient and remanded the case with directions to quash the indictment and take such further proceedings as to justice might appertain. That indictment was dismissed, and a new one drawn. The defendants filed pleas of former jeopardy. The Circuit Court instructed the jury to find against the pleas because this court "had decided that the former indictment was insufficient." The case was again brought to this court. In discussing the question of former jeopardy this court, at page 671, says:

Their plea of former conviction can not be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because *it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.*

* * * The court therefore rightly over-
ruled their plea of former jeopardy;
* * *

In *Murphy v. Massachusetts*, 177 U. S., 155, this court follows and extends the above view. The plaintiff in error had been sentenced by a State court to prison for 10 years. *After serving nearly three years* of the sentence, he sued out a writ of error from the Supreme Judicial Court of Massachusetts, alleging the unconstitutionality of the statute under which he had been sentenced. That court upheld his contention as to part of the charges, and remanded the case for resentence according to law. After resentence a writ of error was sued out from this court, alleging as one of the specifications of error—

that the sentence under which he is now held puts him twice in jeopardy. * * *

This court, in its opinion, at pages 158, 161, said:

In prosecuting his former writ of error plaintiff in error voluntarily accepted the result, and *it is well settled that a convicted person can not by his own act avoid the jeopardy in which he stands and then assert it as a bar to subsequent jeopardy.*

* * * The Superior Court, being obliged to render a specific sentence, deducted the time Murphy had served, notwithstanding the case really occupied the same posture as if he had sued out his writ of error on the day he was first sentenced, and the mere fact that by reason of his delay in doing so he had served a portion of the erro-

neous sentence could not entitle him to assert that he was being twice punished. * * *

The plea of former jeopardy or of a former conviction can not be maintained because of service of part of a sentence reversed or vacated on the prisoner's own application.

In *Trono v. United States*, 199 U. S., 521, 533, this court said:

It has been held, as late as *United States v. Ball*, 163 U. S. 662, 671 (and nobody now doubts it), that if the judgment of conviction be reversed on his own appeal, he can not avail himself of the once-in-jeopardy provision as a bar to a new trial of the offense for which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has once been convicted. This holding shows that there can be a waiver of the defense by reason of the action of the accused. As there is, therefore, a waiver in any event, and the question is as to its extent (that is, how far accused by his own action may be deemed to have waived his right), it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of judgment, even as to that part of it which acquitted him of the higher while

convicting him of the lower offense. When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. * * *

There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not cover the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable.

Neither on facts nor in doctrine does the *Lange* case support Shapiro's contentions. The court expressly distinguished (p. 173)—

a class of cases in which a second trial is had without violating this principle. As when the jury fail to agree and no verdict has been rendered, or the verdict set aside on motion of the accused, *or on writ of error prosecuted by him*, or the indictment was found to describe no offense known to the law. [Italics ours.]

Then follows a declaration on the part of the court that the original judgment was not void but merely voidable, and the court distinguishes a case in which that should not be true. It says (p. 174):

And so it is said that the judgment first rendered in the present case being erroneous must be treated as no judgment, and, there-

fore, presenting no bar to the rendition of a valid judgment. The argument is plausible but unsound. The power of the court over that judgment was just the same, whether it was void or valid. If the court, for instance, had rendered a judgment for two years' imprisonment it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, *if no part of the sentence had been executed*, it could have rendered a judgment for two hundred dollars fine after vacating the first. Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held—so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to *assert his freedom by force*—whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us. The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense on a valid verdict.

Thus we have an express limitation placed upon the doctrine of the *Lange* case, in the case itself, when the court refuses to apply it to a case in which the original judgment was invalid.

In his brief (p. 23) Shapiro uses (in bold-faced type) a headnote from *Kepner v. United States*, 195 U. S. 101, to the effect that—

second jeopardy is not against the peril of second judgment, but against being again tried for the same offense.

By quoting from the headnote, instead of from the opinion (p. 133), he had a seemingly plausible, and to him extremely helpful, principle of law. A slight analysis of the facts of the *Kepner* case (through the *Trono* case, *supra*, which discussed the former at some length and limited its doctrine to its own peculiar facts) discloses the superficiality of the argument. At page 529 this court said:

The difference between that case (*Kepner* case) and the one now before the court is obvious. Here the accused, while acquitted of the greater offense charged in the complaint, were convicted of a lesser offense included in the main charge. They appealed from the judgment of the court of first instance, and the Government had no voice in the matter of the appeal: it simply followed them to the court to which they appealed. We regard that fact as material and controlling. *The difference is vital between an attempt by the Government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the judgment and asking for its reversal, even though that judgment, while convicting him*

*of the lower offense, acquits him of the higher one charged in the complaint. * * **

And generally it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that *in appealing from the judgment the accused necessarily appeals from the whole thereof*, as well that which acquits as that which condemns; that the judgment is one entire thing, and that as he brings up the whole record for review he thereby waives the benefit of the provision in question for the purpose of attempting to gain what he thinks is a greater benefit, viz, a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused but also in regard to the lesser grades of that offense, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set aside, and *when so set aside and reversed the judgment is held as though it had never been.*

* * * * *

In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, *but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never*

been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to *limit his waiver as to jeopardy* when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed.

III.

THERE WAS NO COMPROMISE.

- (A) The plea did not aver facts essential to an authority in the commissioner to compromise with Shapiro under section 3229, Rev. Stat.

The compromise alleged by Shapiro to have been accepted and perfected by the Commissioner of Internal Revenue need not be discussed at great length in this brief. It was set forth in a special plea rightly demurred to by the Government on the ground that it did not allege compliance with the terms of R. S. 3229, under which, if at all, it must have been made.

The statute in question provides that the Commissioner of Internal Revenue—

with the advice and consent of the said Secretary [of the Treasury] and the recommendation of the Attorney General, [he] may compromise any such case after a suit thereon has been commenced.

There is no evidence, either in the recitals of the said plea, or elsewhere in the case, that the alleged compromise was entered into with the advice and consent, and upon the recommendation of the proper officials.

In his brief (p. 38) Shapiro cites 12 Opinions Attorney General, 472, in support of a proposition that the absence of such consent and recommendation is not fatal to the validity of his compromise. He says:

Under the ruling of the Attorney General the functions of the Secretary of the Treasury and the Attorney General are purely advisory.

In the first place, Shapiro misquotes the so-called "ruling," and in the second place that which he attempts to quote has no such effect in the context in which it is used as Shapiro would claim for it. Indeed, the net result of the opinion is precisely the reverse of that claimed by Shapiro. The question before the Attorney General was—

whether in the matter of an application for the compromise of a pending judicial proceeding, under the internal revenue laws, the

opinions of both the Commissioner of Internal Revenue and the Secretary of the Treasury *should be expressed before the case is referred to the Attorney General*, or whether the sense and force of the word "recommendation" require that the opinion or advice of the Attorney General should be given before any action is taken in the case by both or either of the other officers (p. 473).

On the same page, the Attorney General says:

The statute, it will be seen, does not indicate the order in which the officers named shall act, *but it does require, before any compromise shall be made of a pending suit, that the Commissioner of Internal Revenue, the Secretary of the Treasury, and the Attorney General shall concur in opinion that the compromise would be advantageous to the United States* (pp. 473, 474). * * *

If the Secretary and the Attorney General both concur in the opinion that the compromise should be accepted, the commissioner will be then authorized to make it. *If they agree that the proposed compromise would be inexpedient, or if they differ in opinion upon that question, he is not authorized to accept it* (p. 475).

Two cases are cited by Shapiro neither of which support the proposition which he is attempting to advance.

In *United States v. Chouteau*, 102 U. S. 603 (Shapiro's brief, p. 39), the Commissioner of Internal Revenue, *with the advice and consent of the Secre-*

tary of the Treasury and upon the recommendation of the Attorney General, had accepted \$1,000 in full satisfaction, compromise, and settlement of the indictment and prosecutions, which were thereupon dismissed and abandoned. This court said in its opinion (p. 610):

Under the authority of an act of Congress, a compromise with the Government was effected, by which a specific sum was paid by him, and received by the Government, "in full satisfaction, compromise, and settlement of said indictments and prosecutions," which were accordingly dismissed and abandoned.

In *Wells v. Nickles*, 104 U. S. 444 (Shapiro's brief, p. 40), this court came to a similar decision, that the compromise in question was *duly authorized*, and *therefore*—

bound the United States, whose agent made the compromise.

CONCLUSION.

It is respectfully submitted: (1) There was no double jeopardy either in fact or by admission of the averment of the plea; (2) had either obtained, Shapiro was estopped to plead or urge it; (3) no authorized compromise was averred in the plea; and (4) the judgment below should be affirmed.

WM. WALLACE, Jr.,

Assistant Attorney General.

NOVEMBER, 1914.

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(iii)

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

DAVID SHAPIRO, PLAINTIFF IN ERROR,	} No. 93.
v.	
THE UNITED STATES.	

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

ARGUMENT.

In this brief the Government admits for argument's sake merely that the court *assumed* to accept the plea of *nolo contendere* *when* offered, and concedes that the supplemental record it recently filed shows that the court and parties *proceeded* to a hearing under, and that the court bedded its sentence upon those *assumed* pleas. Nevertheless the alleged jeopardy did not exist; or if it ever existed it is now unavailing.

I.

June 21, 1910, an indictment of thirteen counts was filed, each count stating a different offense.

The tenth charged an offense punishable by *fine alone*. All the other counts were so-called "prison counts" and felonies as defined in the Tucker opinion (196 Fed. 262; Sug. Dim. Record, printed p. 26.) Confusion may arise on account of an erroneous reference on page 3 of Shapiro's brief in opposition to the motion to dismiss, to section 3286 Rev. Stat. [the section should be 3296 Rev. Stat. (R. 7)]; and also to section 3317 Rev. Stat. (when the reference should be to an amendment of that section enacted in 1879—20 Stat. 229.) These corrections make what would otherwise appear to be "misdemeanor-fine" counts actually "felony-prison" counts.

June 24, 1910, Shapiro plead "not guilty" to every count. January 3, 1911 (R. 9), by leave of court he withdrew the plea of "not guilty"; was re-arraigned, and "pleads nolo contendere."

Because it simplifies the argument, let us assume that the thirteen different offenses were stated in thirteen different *indictments* rather than counts. The plea of "not guilty" made a proper issue. The withdrawal of the pleas destroyed those issues. The defendant was bound to answer *each* offense and indictment by lawful plea. The court had no power to accept, nor the district attorney to consent to, other than a legally allowable plea. In *United States v. Mayer*, No. 462, October term, 1914, decided November 16, 1914, this court said:

The subsequent proceeding was in effect a new proceeding which, by reason of its char-

acter, invoked an authority not possessed.
 * * * As the District Court was without
power to entertain the application the con-
 sent of the United States Attorney was un-
 availing.

In the Tucker opinion (196 Fed. 266, 267; Sug.
 Dim. Rec. printed pp. 36-37) the court said:

The case for such allowance must be
within the class of misdemeanors for which
the punishment may be imposed by fine
*alone. * * ** So defined, the rule affords
no ground for entertaining the plea (nolo
*contendere) either in cases of felony * * **
or in cases of misdemeanor for which the
punishment must be imprisonment for any
term, with or without a fine.

In the Tucker case, speaking of *fine* counts that
 remained to the end, the court said (267):

So it was within the authority of the prose-
 cuting officer to elect to stand for the pur-
 poses of the plea, *on the counts applicable*
thereto, and was plainly within the *jurisdic-*
tion of the court to approve such submission.
 (Sug. Dim. Rec. printed p. 39.)

Per contra, as to counts to which the plea was not
 applicable, the United States Attorney lacked au-
 thority to consent to the plea and it was not within
 the *jurisdiction of the court* to accept it.

Shapiro could only escape *each* assumed indict-
 ment by (1) acquittal; (2) conviction, or plea of
 guilty, or other equivalent and legally-acceptable
 plea; or (3) dismissal. The assumed case then on

January 3, 1911, stood thus: Rearraigned on thirteen indictments, Shapiro interposed a plea of *nolo contendere* to each. This was not in law any answer to twelve of the indictments. The court had no power to accept it and the United States Attorney could not lawfully assent to it, as to twelve. And as to twelve, the case stood before the law as if no plea had been offered or entered to any of them. It was, as to them, a case of arraignment without plea. Had the United States Attorney on January 4, 1911, then realized the office of that plea and moved to strike the plea as to each of the twelve indictments the court could only have sustained the motion and ordered a proper plea—*one that would support the prison sentence demanded by the law*. In this event the ultimate result *now obtaining* would have been achieved in the first instance.

To the remaining five indictment the plea was proper and could have been assented to by the United States Attorney, and accepted by the court. But on *January 20, 1911*, (R. 10) the United States Attorney dismissed that single five indictment, together with all the prison indictments save 4, 9 and 12; and the defendant by the court was "discharged from further prosecution" under those so dismissed. That dismissal *did not in fact*, and *could not in law* be construed to include 4, 9 and 12, because (a) all parties and the court, later went ahead to judgment and sentence, showing that no one then believed they were dismissed; (b) indictments 4, 9, and 12, could not have been affected by

any order under any *other indictment* in any other case; (c) if count 10 (the fine count) had been dismissed *before* the original plea of "not guilty" was withdrawn this would not have carried the other indictments (counts) with it or relieved the defendant of responding to them, or changed the rule as to pleas allowable to them. No more can it do so in case of *after* dismissal. The case in law, *then* stood without any issue as to indictments 4, 9 and 12. On the same day the court proceeded to a hearing on assumed pleas *not legally existing*. It plainly appears from the supplemental record that the court, all the lawyers, and the client each then thought that the pleas were authorized to prison counts and would warrant a prison sentence. (Sug. Dim. Rec., printed pp. 59, 118, 121-122, 123, 124.) On *January 23rd* the court imposed a fine and prison sentence. *No other sentence was authorized by law* for the offenses charged in indictments 4, 9, and 12. There was no verdict; there was no jury trial; and *in law*, there was no plea. Therefore, there was nothing between the information and the judgment and sentence to support the latter.

Mere arraignment can not make jeopardy. There was here no jeopardy by verdict. There was none by the unauthorized plea of *nolo contendere* (mistakenly tendered, and which the United States Attorney was powerless to assent to, and the court was powerless to accept). There was nothing on which to base a claim of jeopardy until the judgment and sentence. That judgment was either valid, void, or

voidable. If valid or voidable there was jeopardy; but only *until* that judgment was reversed at Shapiro's instance. If void, there never was jeopardy, and Shapiro could have gained release on habeas corpus. While the lack of jury trial, verdict, and opportunity of full defense *to the merits*, distinguishes this case from the Garland case (232 U. S. 644)—also a case of no plea—the decision of the Circuit Court of Appeals is conclusive here that this judgment was not valid against direct review. We are not concerned to know whether it was void or voidable, because Shapiro *on direct review secured its reversal*. (196 Fed. 268-269.) Thus *by Shapiro's own hand perished the only action that might have made for jeopardy*. In the *Lange* case (18 Wall. 173-4) the fine had been *wholly paid* and the law did not authorize *both fine and imprisonment*. The court said:

But there is a class of cases in which a *second trial* is had *without violating this principle, as when * * * the verdict (is) set aside on motion of the accused, or on writ of error prosecuted by him, etc. * * ** The power of the court over that judgment was just the same whether it was void or valid.

Those three indictments (counts), 4, 9, and 12, were never dismissed. Shapiro was never acquitted of the offense charged in each. The *law demanded* a *prison sentence* which he could only escape by acquittal or dismissal of those charges. No mistakenly tendered and unauthorized plea, and no

action of court or counsel thereunder, could operate to relieve him of the demand of the law for prison sentence. Mistakes can not change the law. As the mistake of the Government in assuming that the plea warranted a prison sentence (though this belief was then concurred in by Shapiro and his counsel) could not aid it to uphold the judgment in the Circuit Court of Appeals, no more can the mistake of Shapiro (though concurred in by the Government) as to the effect of the court's action in assuming to accept this plea to a prison count, give the plea greater efficiency or availability than the law gives it, or thereby aid Shapiro to a claim of jeopardy on *that* plea *against those charges*.

II.

The Circuit Court of Appeals mandate read:

The *judgment* of the said district court
 * * * *is hereby reversed* * * * and
 and that this cause is hereby remanded
 * * * with direction *either to accept or
 refuse acceptance* of the nolo contendere
 plea as *tendered* and *proceed further* in con-
 formity with law. (R. 15; 196 Fed. 268-9.)

Shapiro says the lower court could *only accept* the plea *despite the mandate*—and this because (1) it had in fact, long before the review in the Circuit Court of Appeals accepted the plea, and (2) no other course would be “in conformity with law.”

The language "in conformity with law" does not modify the clause "either accept or refuse acceptance of the nolo contendere plea as tendered," but rather the words "and *proceed further*" and is limited to those proceedings to occur *after* the earlier clause has become "*functuo officio*," by *either* acceptance or rejection of the plea.

As to the first contention: To so hold would be to make (1) the *unauthorized* act of a judge in accepting such a plea to a prison count a valid and lawful judicial act; and (2) to make the unauthorized acceptance operate to *alter the law* so as to warrant a *fine sentence only* for an offense demanding imprisonment *under the law*.

Suppose on the remand the District Court had *accepted* the plea as is now said it should have done. Shapiro would then have been in position to claim either (1) that he could *not be sentenced at all*, because *the law demanded imprisonment* whereas the accepted plea *forbade imprisonment*; or (2) that he could only be fined under the plea—thereby, though admitting guilt, escaping the sentence *demanded by the law* for the offense confessed. Appreciation of these possible consequences may have moved the court to take the course it did.

Really instead of being only entitled to accept the plea, the court could *only lawfully reject that plea* under the mandate. And this because the plea as defined by the Circuit Court of Appeals, could not be lawfully accepted to the three indictments (counts) then before it.

(Of course, the Circuit Court of Appeals overlooked the distinction between the Tucker and Shapiro cases, in the absence of any *fine* count in the latter; else its mandate must have been "to *reject* the plea and proceed further in conformity with law." Tucker case, 196 Fed 267; Sug. Dim. Rec. 38, 39; Shapiro case, 196 Fed. 268.)

Shapiro asks this court to disregard the alternative mandate to "either accept or refuse acceptance" and to read the mandate as compelling the lower court to a second acceptance. He does this because of extraneous events transpiring prior to the writ of error from the Circuit Court of Appeals, demonstrating, he insists, a previous acceptance by the lower court of the plea. Equally, then, may the Government insist that the same events be analyzed to show that such attempted acceptance was beyond the power of the court in twelve of the cases and that lawfully it could only have rejected the plea as to them in the first instance, and, therefore, under the mandate, it could only reject. Especially is this so since the decision of the Circuit Court of Appeals to the effect that the plea was not legally acceptable to the prison counts was *sought* and *procured by Shapiro himself*.

III.

And this brings us to Shapiro's attitude in the Circuit Court of Appeals.

He now claims that his only contention in that court was that there should be but a fine sentence. He is refuted by his printed brief. Under the

heading "Points" page 3, et seq., the following among others were made:

III. *Nolo contendere* is *not* a *plea* that *could be taken* in a *felony* sentence either under the common law or statute.

IV. The *only plea* upon which sentence of *imprisonment* could be pronounced against the defendant in a criminal case *after* the withdrawal of a plea of not guilty, *would be a plea of guilty*. This was *not done* in this case. On the contrary, the *record shows that evidence was heard* by the court, and *that the court, upon hearing of the evidence, found the defendants guilty*. This the court could not do. Whether the defendants were *guilty or innocent was a question to be submitted to a jury*.

The first black type heading under his brief of argument (p. 6) was the following:

The District Court upon the condition of this record *had no jurisdiction to pass judgment* in the aforesaid causes.

And a further black type heading on page 16 read:

Nolo contendere not being a plea no issue was presented to the court and no plea in fact was made before trial and sentence.

To this point Shapiro cited, and liberally quoted from *Crain v. United States*, 162 U. S. 625-650.

And finally, under the black type heading "Sentence is excessive," he argued (p. 18):

If it should be held that * * * *nolo contendere* is applicable in felony cases

* * * then it is respectfully submitted that the District Court erred in imposing a penitentiary sentence.

No refined argument will avoid the force of the first and second assignments of error in the Circuit Court of Appeals (his brief p. 2) or the plain statement of Shapiro's position in that court as evidenced by the above quotations from his brief.

He made two prominent contentions. (1) He challenged the power of the court to receive that plea to those counts. (2) If the plea could be entertained the judgment pronounced was excessive.

And the Court of Appeals correctly interpreted his position in that regard. (196 Fed. 262.) The claim that the sentence was excessive and should be limited to a fine only was a separate contention urged in the event the power to accept the plea and sentence under it, should be upheld. Shapiro's brief before the Circuit Court of Appeals was a forcible argument for the very position we have hitherto taken in this brief and he successfully inclined that court to that view and so secured a reversal.

IV.

No amplification of the Government's original brief is needed as to the plea of former jeopardy by alleged compromise. The effect of the plea on the motion to dismiss will be considered in VI infra.

As to that portion of the second plea of former jeopardy advancing the retention of \$5,000 by the Government, as a partial satisfaction of the fine judgment:

On *May 2, 1911*, the Circuit Court of Appeals vacated the supersedeas as to the fine. Execution issued and the Dearborn National Bank was garnisheed. The garnishment was later released. (R. 24-26.) The collector of internal revenue then had \$5,000 which *Shapiro* had previously, and in *September* and *December, 1910*, deposited in connection with the compromise offer. (R. 21.) The plea alleges that the Government retains this amount. The *same officer* (collector) who *received it* from *Shapiro* *still holds it*. It was in his hands at the time of the withdrawal of the plea of "not guilty," the tender of the plea of *nolo contendere*, the hearing, and the original judgment and sentence—indeed, during every proceeding in the cause after the original plea of "not guilty." *Shapiro voluntarily placed it there*. The collector had no authority *to use it* in part payment of the *fine judgment*, nor was it ever so used. And finally, *Shapiro* himself, secured a *reversal of the whole judgment* so that there is nothing upon which the \$5,000 deposit could now be applied nor could the Government after the reversal, have proceeded to impound or apply the \$5,000 *upon a judgment which no longer existed*; nor could it have collected

in any manner the excess of the former fine judgment of \$10,000. *Not a single case* cited by counsel involved a judgment reversed or vacated at the instance of the prisoner. Every case (save *Whitney v. State*, brief, p. 36) arose upon habeas corpus, and in every one, including the *Whitney* case, the sentence or some specific part thereof, or a later *second* increased sentence, was attacked as void. In the *Parks*, *Morse* and *Twced* cases the *whole valid part* of the sentences had been entirely satisfied before the habeas corpus petition was filed. In the *Lange* case the sentence was fine *and* imprisonment. The law only authorized one *or* the other, and one alternative (sentence) had been fully satisfied. In all the other cases the petitioners were remanded. The *Weymouth*, *Rice*, *Cannon* and *Whitney* cases involved increased sentences imposed by the judge after the imposition of the original sentence, and either after the expiration of the term of court at which the original sentence was pronounced or after the commitment of the defendant under it. In *Sennott's* case the court held that the sentence was not excessive; that the remedy should be by writ of error and not habeas corpus. And the italicized reference by that court to the *Lange* case was a mere dictum and an erroneous analysis.

In the case at bar, conceding that the retention by the collector of the money deposited with him by Shapiro was a partial payment of the fine—as

it was not—nevertheless, even had it been received by the clerk through the marshal, and applied by the former on the fine sentence, and covered into the Treasury as court moneys, it would only have satisfied one-half of a fine, which was itself *a part* only, of a composite fine and imprisonment sentence expressly authorized by law. Moreover the *whole* sentence was later annulled at Shapiro's instance. The effect of this plea on the motion to dismiss will be next considered.

VI.

In support of the jurisdiction of this court in direct review, Shapiro contends that his second and third grounds of alleged double jeopardy, are not vulnerable to the motion to dismiss. This contention is unsound for two reasons: (1) Neither ground presents a genuine constitutional question; and (2) there is no distinction between them and the first ground in this regard.

1. An offer of compromise without the advice or consent of the Secretary of the Treasury or the recommendation of the Attorney General, though accepted by the commissioner, is on its face no compromise. Therefore a denial of that plea does not raise a real or substantial constitutional question such as is necessary to confer jurisdiction. (*Goodrich v. Ferris*, 214 U. S. 71, 79; *American Sugar Refining Co. v. United States*, 211 U. S. 155, 161, 162; and *Kaufman & Sons Co. v. Smith*, 216 U. S. 610.) Nor does mere retention by the collector of money

deposited with him by Shapiro on the latter's offer of compromise, without any impounding *and application* on the fine sentence before Shapiro secured its reversal, constitute any fair basis for claim of jeopardy; and certainly not to perpetuate jeopardy *beyond* such a reversal; and the denial of this plea likewise raises no substantial constitutional question.

2. While the second and third grounds of the jeopardy pleas were not before the Circuit Court of Appeals, no more was the first. Nor was it essential that either should have been before that court.

In *Union Trust Co. v. Westhus*, 228 U. S. 523, 524, this court said:

It is insisted, however, that in both the Aspen and the Alton cases, the questions which it was sought to review by direct appeal after the decision of the Circuit Court of Appeals, had been, either expressly or by necessary implication, *passed upon by that court*, and therefore were expressly foreclosed; while *here such is not the case, since the constitutional question was not in the case when it went to the Circuit Court of Appeals, but only made its appearance by an amendment to the pleadings after the decision of that court*. Granting the premise upon which the argument rests *the deduction is unfounded*. * * * The error comes from attempting after the case has been taken to the Circuit Court of Appeals and there decided, to resort to proceedings for

review which *under the statute are applicable only in case no such action* by the Circuit Court of Appeals *had been taken*.

As the events on which the first ground depended occurred before the decision of the Circuit Court of Appeals, so the offer of compromise and the deposit of the \$5,000 were made even earlier and in September and December, 1910 (nearly a year and a half before the writ of error from the Circuit Court of Appeals); while the vacation of the supersedeas to permit the issue of execution was ordered by the latter court itself, and the garnishment was released long before its decision.

All three grounds of the pleas might have been advanced to the latter court on Shapiro's motion to release the mandate, or even long before by earlier motion. None of them were so presented.

The determination of each necessarily involved a canvass of what the court below could or could not do under the mandate—in the case of one plea as much as another. Upon each Shapiro in effect said: "Because of these happenings, if you 'proceed further in conformity with law' under this mandate, you must discharge me under the compromise plea, and either discharge me or impose only a fine under each of the other two." And if this court reviews, the action taken below must determine whether it was authorized and in conformity to the judgment and mandate of the Circuit Court of Appeals, in the case of each jeopardy plea.

CONCLUSION.

1. The plaintiff in error has sought the wrong avenue of approach to this court. 2. His plea of former jeopardy on every ground is unsound and unavailing. 3. The judgment of the district court should be affirmed.

WM. WALLACE, JR.,
Assistant Attorney General.

NOVEMBER, 1914.

SHAPIRO *v.* UNITED STATES.ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

No. 93. Argued December 3, 4, 1914.—Decided December 14, 1914.

In a case remanded to it by the Circuit Court of Appeals, the District Court must apply the principles laid down in the decision for its guidance; and if the mandate required it to reject a plea of *nolo contendere* on the only counts on which the Government stood and to proceed with the case, it must, in obedience to the mandate, set aside the plea.

This court cannot reverse the ruling of the Circuit Court of Appeals upon a writ of error to the District Court which acted upon the mandate even though new constitutional questions were raised in the District Court after the case had been remanded. *Union Trust Co. v. Westhus*, 228 U. S. 519.

This court cannot take a case in fragments and, if reviewable on direct writ of error, by reason of the presence of a constitutional question, the whole case must come here.

There is ample opportunity for a review by this court of every judgment or decree of a lower court contemplated by the act of 1891 (now embodied in the Judicial Code); but, in the distribution of jurisdiction, this court is not authorized to review a judgment or decree of the Circuit Court of Appeals otherwise than by proceedings addressed to that court. *Brown v. Alton Water Co.*, 222 U. S. 325.

THE facts, which involve the jurisdiction of this court to directly review the judgment of the District Court in a case in which that court acted in accordance with the mandate of the Circuit Court of Appeals, are stated in the opinion.

Mr. Elijah N. Zoline for plaintiff in error.

Mr. Assistant Attorney General Wallace, with whom *The Solicitor General* was on the brief, for the United States.

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Opinion of the Court.

MR. JUSTICE HUGHES delivered the opinion of the court.

On June 21, 1910, David Shapiro—the plaintiff in error—was indicted for violation of the Internal Revenue Laws. The indictment contained thirteen counts. Eleven charged offenses punishable by both fine and imprisonment; one (the tenth) was for an offense punishable by fine only; and one (the thirteenth) was for an offense punishable by fine or imprisonment, or both.¹ On June 24, 1910, the plaintiff in error pleaded 'not guilty' to every count; on January 3, 1911, 'by leave of court first had and obtained,' he withdrew this plea, and, being then arraigned upon the indictment, he pleaded '*nolo contendere thereto*'; on January 20, 1911, the United States entered a *nolle prosequi* as to all the counts, save those numbered 4, 9 and 12, each of which charged a felony (Crim. Code, § 335); later, on the same day, the cause 'coming on to be heard on defendant's plea of *nolo contendere*,' the court 'having heard the evidence by the parties adduced and statements of counsel' took the cause under advisement; and on January 23, 1911, the court being fully advised found the defendant guilty as charged in the indictment, and upon this finding sentenced him to imprisonment for two years and to pay a fine in the sum of \$10,000 in addition to costs.

Shapiro sued out a writ of error from the Circuit Court of Appeals, assigning as errors (1) that the District Court had no jurisdiction to pass judgment in this case on a plea of *nolo contendere*; (2) that it erred in sentencing him without a trial by jury; (3) that by the judgment he had been deprived of his liberty without due process of law, within

¹ Counts 1, 2, 3 and 4 charged a violation of § 3296 of the Revised Statutes; counts 5, 6, 7 and 8, of § 3317, amended by Act of March 1, 1879, c. 125, § 5, 20 Stat. 327, 339; count 9, of § 3318; count 11, of § 3326; count 12, of § 3324; and count 13, of § 3455.

Count 10 charged a violation of the act of July 16, 1892, c. 196, 27 Stat. 183, 200. See Rev. Stat., § 3456.

the meaning of the Fifth Amendment; and (4) that the sentence was excessive and should be limited to a fine only. The Circuit Court of Appeals reversed the judgment, 196 Fed. Rep. 268. The grounds of the reversal are set forth in its opinion in *Tucker v. United States*, 196 Fed. Rep. 260,—a case, decided at the same time, which the court deemed to be similar in all material respects. It was held that the plea of *nolo contendere* was not authorized in the case of an offense which must be punished by imprisonment, with or without a fine; that where counts charging offenses which must be punished by imprisonment are joined with counts charging those which may be punished by fine only, the plea may be entertained as 'in the nature of a compromise'; and that in such case it is 'within the authority of the prosecuting officer to elect to stand, for the purposes of the plea, on the counts applicable thereto,' and it is 'within the jurisdiction of the court to approve such submission.' It was further held that in the particular case the proceedings and judgment were in derogation of the plea; that it did not appear in the record that the plea was either 'accepted in fact' or 'substantially so treated'; that the proceedings leading to the judgment, the adjudication of guilt, and the judgment itself in its sentence of imprisonment, were inconsistent with the acceptance of the plea; and hence that the record failed to show an authorized plea to support the judgment. *Id.*, pp. 267, 268. The cause was remanded 'with direction either to accept or refuse acceptance of the *nolo contendere* plea as tendered, and proceed thereupon in conformity with law.'

Thereupon, the District Court, against the exception of the plaintiff in error, refused to accept the plea of *nolo contendere* tendered by him and directed him to plead to the indictment; he stood mute, and the court entered for him a plea of not guilty. Subsequently, by leave of the court, the plaintiff in error filed three special pleas. The first

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Opinion of the Court.

plea, in substance, set forth the prior proceedings and alleged that the plea of *nolo contendere* had been duly accepted, that the court acting thereon had heard evidence solely for the purpose of fixing the punishment to be imposed, and that therefore he had been once before in jeopardy for the same offense and ought not, by virtue of the protection guaranteed by the Fifth Amendment, to be further prosecuted. The second special plea set forth that the defendant had compromised the civil and criminal liability with the Commissioner of Internal Revenue. And the third special plea urged that, while the writ of error was pending in the Circuit Court of Appeals, the original order of supersedeas had been modified so as to permit the judgment to be enforced as to the fine, that thereupon the United States had procured to be seized a certain draft for \$5,000 in partial satisfaction of the fine, and that it followed under the Fifth Amendment that, the judgment having been satisfied in part, the plaintiff in error could not be tried again upon the same indictment.

Meanwhile, the plaintiff in error moved in the District Court to correct the record so as to have it show that the plea of *nolo contendere* had been accepted, and petitioned the Circuit Court of Appeals to release its mandate in order that the correction might be made. This petition was denied and the motion in the District Court was not pressed.

The Government demurred to each of the three special pleas and the District Court, sustaining the demurrers, proceeded to trial. The jury rendered a verdict of guilty, motions for a new trial and in arrest were overruled, and the plaintiff in error was sentenced to imprisonment for two years and to pay a fine of \$5,000. The case is now brought directly to this court.

The motion to dismiss must be granted. *Aspen Mining Co. v. Billings*, 150 U. S. 31; *Brown v. Alton Water Co.*, 222 U. S. 325; *Metropolitan Water Co. v. Kaw Valley District*,

223 U. S. 519; *Union Trust Co. v. Westhus*, 228 U. S. 519. The duty of the District Court was defined by the decision of the Circuit Court of Appeals and in its further proceedings it was bound to apply the principles which that court had laid down for its guidance. It may not have been observed by the appellate court that, in the case of Shapiro, the Government had entered a *nolle prosequi* as to the counts charging an offense which might be punished by fine alone; but this being the actual state of the record, it cannot be doubted that, reading the mandate of the appellate court in the light of its opinion, the District Court was not free to accept the plea of *nolo contendere* as applicable to the remaining 'prison counts.' Its obedience to the mandate under the law as declared by the Circuit Court of Appeals required it with respect to these counts upon which the Government stood to reject the plea of *nolo contendere* and to proceed with the case. It is now assigned as error that the District Court did set aside this plea. It is insisted that the plea had been accepted when originally tendered, but this is negatived by the ruling of the Circuit Court of Appeals and we are in substance asked to revise its decision upon a writ of error to the District Court. This would be to transcend the limits of our jurisdiction as it has been clearly defined in the cases cited.

It is no answer to say that new constitutional questions were raised by the special pleas after the case had been remanded to the District Court. We cannot take the case in fragments and if it is reviewable upon a direct writ of error, by reason of the presence of a constitutional question, the whole case must come here and we must assume the duty of passing upon the proceedings of the District Court which were taken by it under the mandate of the Circuit Court of Appeals. The ruling upon this point in *Union Trust Co. v. Westhus*, *supra*, is controlling. There, the constitutional question was raised by an amendment to the pleadings in the District Court after the decision of

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Syllabus.

the Circuit Court of Appeals, and it was insisted that this fact made the previous decisions inapplicable. But the asserted distinction was not sustained. The error lay, it was said, 'in pursuing a mistaken avenue of approach to this court,' that is, 'of coming directly from a trial court in a case where, by reason of the cause having been previously decided by the Circuit Court of Appeals, the way to that court should have been pursued even if it was proposed to ultimately bring the case here.' There is, as was pointed out in *Brown v. Alton Water Co.*, 222 U. S. 325, ample opportunity for a review by this court of every judgment or decree of a lower court which the act of 1891 (now embodied in the Judicial Code) contemplated should be here reviewed, but, in the distribution of jurisdiction, this court is not authorized 'to review a judgment or decree of a Circuit Court of Appeals otherwise than by proceedings addressed directly to that court.'

Dismissed.

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